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This issue is dedicated to
Luis Kutner

His outstanding efforts on behalf of Peace and Human Rights around the world deserve our highest praise. His role as an advocate for those less fortunate is an example to us all.

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Law And Peace*

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The establishment and maintenance of a comprehensive peace, through law rather than by arbitrary violence and coercion, is today commonly regarded as one of humankind's most urgent and difficult problems. To achieve a productive understanding of what law may contribute to peace, of the inextricable interrelations of law and peace, it is necessary that we observe the larger context of global processes of interaction that contain and condition both law and peace. We must formulate appropriate conceptions of law and peace, note the inadequacies in our inherited theories and procedures designed to serve peace and, finally, apply to the general problem, and numerous particular problems of promoting peace, certain relevant intellectual tasks. These tasks, extending beyond the unsystematic, anecdotal pursuit of random strategies in effective power, or the traditional logical derivation from allegedly autonomous legal rules, include the postulation and clarification of basic community goals, the examination of past trends in the achievement of such goals, the exploration of the factors that affect degrees in achievement, the projection of possible futures, and the recommendation of alternatives in decision process and particular decisions that promise a higher degree of success.

We proceed to explore these points of inquiry and intellectual tasks *seriatim*.

I. THE LARGER CONTEXT

In realistic perspective, it can be observed that the whole of humankind today constitutes a single comprehensive community, entirely comparable to its many internal territorial and other communities, in the sense of interdetermination or interdependence in the shaping and sharing of all values.[1] This larger community is composed, not merely of an aggregate of nation-states, but of expanding billions of individual human beings who create, in addition to nation-states, a whole host of other groupings and associations, such as international governmental organiza-

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1. Detailed description is offered in McDougal, Reisman & Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 805 (1988).

tions, political parties, pressure groups, and private associations specialized to all demanded values, in activities increasingly transcending all territorial boundaries. The interdependences that characterize this larger community process, and all its internal component communities, include both those within any, and every, particular value process and those that cut across all value processes. The interdependent activities within, and across, all value processes stimulate, affect and are affected by all decision processes, lawful and unlawful.[2]

A most important component in this larger community process is an ongoing, all pervasive process of effective power, totally global or earth-space in reach, in which decisions are in fact taken and enforced by severe deprivations or high indulgences, oftentimes irrespective of the wishes of any particular participant.[3] For some centuries nation-states have been, and remain, through the resources and people within their boundaries, the principal institutions through which people wield effective power and have engaged in a continuous balancing of such power. In a world in which people and goods are in continuous and increasing movement, the bases of power are no longer hermetically sealed within the boundaries of particular nation-states. Resources are important only as potential values, dependent upon transnational activity; and as science and technology advance and universalize, enlightenment and skill, as well as conceptions of rectitude and responsibility, become of increasing significance as bases of power.

Upon close examination, it may be observed that the decisions taken within this comprehensive process of effective power are of two different kinds.[4] Many decisions are of course taken through sheer naked power or from considerations of expedience, without regard for common interest. Goliaths do not always live, or balance power, easily with pygmies. Many other decisions, however, may be observed to be taken from perspectives of authority, in the sense that they are made by the persons who are expected to make them, in accordance with criteria expected by community members, in established structures of decision, with enough bases in effective power to secure consequential control, and by authorized procedures. The continuous flow of this second type of decision may be realistically described as a comprehensive process of authoritative decision by

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2. These interdependences are minutely outlined in M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER ch. 1 (1980) [hereinafter MCDOUGAL, LASSWELL & CHEN].

3. *See generally*, McDougal, Reisman & Willard, *The World Process of Effective Power: The Global War System*, in POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW 353 (M. McDougal & W. Reisman eds. 1985); G. SCHWARZENBERGER, POWER POLITICS (3d ed. 1964); W. Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1 (1973).

4. For descriptions of these two types of decisions and their interrelations, see M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW ESSAYS (1981) and M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY ch. 1 (1981).

which the effective elites of the global community, after the fashion of elites in lesser communities, seek to clarify and secure their common interests. The decision processes of the most comprehensive, global community affect the shaping and sharing of values both as between and within all its constituent communities, of whatever geographic or functional reach. The decision processes of the lesser regional, national, and local communities in turn affect the distinctive decision processes and value allocations of the larger community which they comprise. The two different kinds of decisions that comprise the global process of effective power, those that employ arbitrary coercion and violence and those that seek through authority to minimize such coercion and violence, are obviously in continuous interaction and struggle. The most comprehensive global community process thus moves incessantly through a continuum between two polar extremes; that of the most intense violence and coercion, sometimes described as "war", and that which emphasizes persuasion and community organized coercion, sometimes described as "peace".

It can be observed, further, that the most comprehensive process of authoritative decision exhibited in the global community, as in lesser component communities, is also composed of two different though closely interrelated types of decision. The first are the constitutive decisions which establish and maintain a process of authoritative decision. These are the decisions that identify and characterize decision-makers, postulate and specify basic community policies, establish appropriate decision structures, allocate bases of power for decision and sanctioning purposes, authorize procedures for the making of different kinds of decisions, and secure the performance of all the different decision functions (intelligence, promoting, prescribing, invoking, applying, terminating and appraising) necessary for clarifying and securing the more detailed policies of the larger community.[5] The second type of authoritative decisions are those that continuously emerge from global constitutive process to establish and maintain a public order: these are the decisions that determine how resources are allocated, planned, developed and employed, how wealth is shaped and distributed, how human rights are promoted and protected or deprived, how enlightenment is encouraged or blighted, how health is fostered or neglected, how rectitude and civic responsibility to the larger community are matured or repressed, and so on through the whole gamut of demanded values.[6] The quality of the constitutive process that a community can establish tremendously affects the quality of the public order it can achieve; conversely, the quality of the public order a community achieves reciprocally affects the quality of the constitutive process it can establish.

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5. The basic features of the existing global constitutive process are described at length in the references in note 4 above and in MCDOUGAL, LASSWELL & CHEN, *supra* note 2.

6. For an outline of claims for the protection of public order values, see MCDOUGAL, LASSWELL & CHEN, *supra* note 2, ch. 3.

II. A RELEVANT CONCEPTION OF LAW

The most relevant conception of law in the global community, as in lesser communities, is, as indicated above, in an ancient tradition revived by the American Legal Realists, that of a comprehensive process of authoritative decision.[7] It is the process, a component of the global process of effective power, by which the politically relevant members of the larger community seek to clarify and secure their common interests and to minimize and regulate the assertion of arbitrary, unauthorized violence and coercion, the other component of the global process of effective power. It will be observed that, as authoritative decision, the term "law" includes reference to both authority, in the sense of community expectations about the requirements of decision, and control, in the sense of actual participation in the making and enforcement of decision. It may need emphasis that the most minimal conception of law requires uniformities in decision in accordance with community expectation; law is the very opposite of the arbitrary, unauthorized use of violence and coercion. The members of the global community, as in lesser communities, who are concerned with the shaping and sharing of values will, further, focus attention, not upon isolated, anecdotal decisions, but upon the whole, comprehensive flow of authoritative decision.

A conception of law, whether for the global community or lesser communities, as a body of rules, though again of ancient origin, is hopelessly myopic. In pluralistic and rapidly changing communities, rules are always complementary, ambiguous, and incomplete. They do not apply themselves, and technology has yet to invent their automation. The only empirical reference, as faint as it sometimes is, of rules is to decision. For established decision-makers, and others, the function of rules is to state community goals and to guide toward the factors in many varying contexts that may affect rational choice. Rules are, thus, but one component, however important, of a comprehensive process of authoritative decision.

The conception of "international law" as a body of rules regulating the interrelations of nation-states is doubly myopic.[8] Beyond the infirmities of its over-estimating of the potentialities of rules, it has infirmities in the scope of the activities it seeks to make subject to law. The activities of humankind in global community process today spill across the boundaries of nation-states in an ever accelerating and intensifying rate. The contemporary conception of "transnational law" takes only a beginning account of the importance of individual human beings, and their multiplicitous associations and groupings, in these new, transnational ac-

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7. Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971). Background is given in W. REISMAN & A. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW (1987).

8. This theme is documented historically in McDougal, Lasswell & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 189 (1967).

tivities.[9] A rational concern for peace in either a minimum or optimum reference, must take these activities into still further account. The law relevant to peace cannot be confined to the coordination of the activities of nation-states. An appropriate law extends, must be extended, to the whole global process of authoritative decision that guides and regulates human activities across nation-state boundaries. In comprehensive conception this process of decision includes among its component features, and interrelates, all the various "roads" to peace indicated in the call for this symposium, such as international governmental organization, third-party decision-making, the facilitation and protection of diplomacy and negotiation, conflict resolution, the organization of deterrence, the management of collective security, and so on.

III. A RELEVANT CONCEPTION OF PEACE

The most relevant conception of peace must make reference to the least possible application of violence and coercion to the individual human being and to the freedom of access of the individual to all cherished values. For community members and their decision-makers alike, a viable conception of peace cannot today be limited to reference to a mere absence of armed, and international, conflict. The peace demanded by contemporary humankind is not that of the concentration camp (however large) or that of the living dead (whatever the community).

The conception of peace, as contraposed to war, in the historic literature of international law is most imprecise.[10] The words "peace" and "war" are characteristically employed, in high ambiguity, to make simultaneous reference both to the presence or absence of the facts of transnational violence and coercion and to the legal consequences to be attached by authoritative decision to different intensities in violence and coercion. The facts to which reference is made are those of the global process of effective power in which many different participants (state and non-state), for many varying objectives in expansion or conservation, employ all instruments of policy (military, diplomatic, ideological, and economic), in alternative stages of acceleration and deceleration in intensity of violence and coercion, in attack upon the bases of power (people, resources, institutions) of other participants, and are themselves in turn the targets of attack. The legal policies and sanctioning consequences that the authoritative decision-makers of the global community apply to the different aspects of this continuous process of violence and coercion vary with many particular problems, such as the minimization of major coercions, the conduct of hostilities, the termination of hostilities, the regulation of minor coercions, and so on. In a first effort to minimize major violence and coercion, through a law of "aggression" and "self-defense," authorita-

9. P. JESSUP, TRANSNATIONAL LAW (1956).

10. For comprehensive review, see M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961) [hereinafter MCDOUGAL & FELICIANO].

tive decision-makers seek to prevent alterations in the existing distribution of values among nation-states by processes of unilateral and unauthorized coercion and to promote value changes and adjustments by processes of persuasion or by community-sanctioned coercion. A second effort, when persuasive strategies fail and violence and coercion break out, is to reduce to a minimum the unnecessary destruction of values by defining with as much specificity as possible the permissible maximum of violence and destruction in particular types of situations. It has been many times documented that our inherited concepts of "peace" and "war," making such ambiguous reference to this vast maze of facts and legal policies, cast but a darkening light upon the difficult problems in public order that presently confront humankind.

It is suggested that a more relevant conception of peace can be found in a specification of contemporary notions of world public order. A distinction is sometimes made between "minimum order," in the sense of the minimization of unauthorized violence and coercion, and "optimum order," in the sense of the greatest access of the individual human being to the shaping and sharing of all the values of human dignity.[11] It would appear, however, that both these kinds of allegedly different public order goals are indispensable to any workable conception of peace. Even when conceived in the minimum sense of freedom from the fact and expectation of arbitrary violence and coercion, peace may be observed increasingly to be dependent upon maintaining people's expectations that the processes of effective decision in public order will be responsive to their demands for a reasonable access to all the values we today characterize as those of human dignity. When peace is more broadly conceived as security in position, expectation, and potential with regard to all basic community values, the interrelationship of peace and human rights quite obviously passes beyond that of interdependence and approaches that of identity. Hence, for reasons of interdependence or identity, there can be but one answer to President John F. Kennedy's question "Is not peace, in the last analysis, basically a matter of human rights?"[12]

The basic community policies that underlie conceptions of peace and human rights are in any democratic community the same policies that underlie all law. Hence, it is no metaphor to conclude that peace and law may appropriately be described as one side of the coin (of community process and effective power) of which arbitrary violence and coercion are the other side.

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11. MCDOUGAL, LASSWELL & CHEN, *supra* note 2, ch. 5.

12. THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES, COMMON SECURITY: A BLUEPRINT FOR SURVIVAL 8 (1982):

> A secure existence, free from physical and psychological threats to life and limb, is one of the most elementary desires of humanity. It is the fundamental reason why human beings choose to organize nation states, sacrificing certain individual freedoms for the common good - security. It is a right shared by all - regardless of where they live, regardless of their ideological or political convictions.

IV. FORMULATING THE PROBLEM

The rising, common demands of peoples about the globe for increased protection from arbitrary violence and coercion and for greater participation in the shaping and sharing of all cherished values are written large in contemporary shared consciousness. Yet the expectation of impending major violence and coercion, employing weapons of apocalyptic destructive potential, continues to hang over the world, threatening and intimidating all peoples and in measure paralyzing "human rights" efforts to increase the participation of all individuals in the shaping and sharing of values. It is this disparity between the demands of the peoples of the world and responding community achievement that constitutes the most general problem in shaping a global legal process designed better to secure peace, whether peace is defined in minimum or optimum terms.

Utopian proponents of peace sometimes ignore that all efforts to improve authoritative decision for better securing peace, however defined, must take place within the context of the contemporary global process of effective power. This process of effective power, as we have noted, exhibits the major nation-states of the world, and especially those possessing nuclear weapons and the capabilities for chemical and biological warfare, engaged in a process of continually balancing power among themselves and others and taking all measures necessary to insure that no single state and its allies are able to secure a position of completely dominant, centralized power.[13] There is no way that peoples cherishing peace and common interest in all the values of human dignity, can avoid direct confrontation with peoples employing violence and coercion for purposes of expansion in special interest and, when necessary, themselves employing military force and other coercion in defense of their values. Humankind has, unhappily, demonstrated down through the millennia that it is sometimes willing to employ the most destructive, unauthorized violence and coercion against others not merely for self-protection, but to secure demanded, though unwanted, changes in the others. The threats and horrors of the contemporary scene need no new depiction or emphasis.

Alleged realists, in contrast, sometimes ignore that authority, as community expectation, is itself a form of effective power, and a form that can be changed and improved. A most important base of power for the decision-makers in any community derives from the expectations of the members of that community that these are the established decision-makers and that they are authorized to make certain decisions, by specified criteria of common interest, and to invoke certain sanctioning consequences to secure compliance. In an age of instantaneous global communication, this form of effective power, with its appeal to world opinion and shared conceptions of rectitude, has enormous and increasing importance.

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13. Relevant historical perspectives are delineated in F. HINSLEY, POWER AND THE PURSUIT OF PEACE (1963); C. MURPHY, THE SEARCH FOR WORLD ORDER (1985).

For perspicuous proponents of peace, the realistic and immediate challenge is that of introducing into the global process of effective power more collectivized, perhaps even more centralized, perspectives and operations of authority, sustained by control. It is not, however, to be assumed that humankind is limited in choice between an anarchy of allegedly equal, independent, and sovereign territorial communities and some fantasied omnicompetent universal state with all its threats to freedom and the values of human dignity. The words federal, confederal, region, alliance, and coalition are primarily meaningful in the present discussion in their suggestion of the infinite variety of potential modalities in organization. The parts may be related to the whole in many different, and changing, ways in a moving context. In the complex contemporary global community process, there can be no magical modality or gimmick for securing peace.

It is of course necessary in any effort toward improvement, to begin with the existing global process of authoritative decision, already collectivized in higher degree than many observers are aware. There is urgent need for reexamination of the competences accorded, in the United Nations and elsewhere, for minimizing resort to major violence and coercion and for the revision of these competences to make them accord more with a genuine democracy and the capabilities for responsibility in the enforcement of decisions. One promising alternative requiring consideration, as we will develop below, is that of enhancing the competence of regional organization and functional groupings. Many improvements could be made also in the multitudinous decisions emerging from global constitutive process in regulation of all the public order values other than power, such as wealth, enlightenment, health, and so on. It is the flow in outcomes of decision with respect to these values that constitute the subject matter of human rights and conditions the achievement of peace in both minimum and maximum conception.

V. THE INADEQUACIES OF EARLY THEORIES AND PROCEDURES

For some centuries the dominant conception of international law has been, as we are too often reminded, that of a body of rules that regulate the interrelations of nation-states.[14] Grotius, building upon a number of predecessors, established himself as the founder of modern international law by recognizing the increasing importance of the nation-state and by outlining a procedure by which an unorganized community of states (without centralized legislative, executive, and judicial institutions) could minimize the occurrence and devastation of major violence and coercion, through assertions of reciprocity and retaliation. In Grotius' eloquent

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14. This history is stated in detail in MCDOUGAL, LASSWELL & REISMAN, *supra* note 8; *see also* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW (R. Macdonald & D. Johnstone eds. 1983); *see also* MORISON, *The Schools Revisited*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW ch. 5 (1983); *see also* W. SCHIFFER, THE LEGAL COMMUNITY OF MANKIND (1954).

words "Quod tibi non vis, alteri non facias": what one does not wish done to himself, he should not do to others.[15] This perception of common interest was built upon the fact, dubbed by later French scholars as *le dédoublement fonctionnel*, that the same states that are claimants in one case may be sitting as judges, through world opinion, in the next comparable case. In a community of a large number of states of relatively equal effective power, even so primitive a procedure could do substantial justice and maintain a modest peace. Grotius ransacked many versions of natural law, sacred and profane, and a great range of prior practices by states and other participants in search of appropriate authoritative rules.

In a recent book, *Visions of World Order*, the late Julius Stone reviews the major historic frames of jurisprudence and considers their past and potential contributions to world public order.[16] It is clear from Stone's presentation, and other surveys, that none of the major frames of jurisprudence either recognize the degree of collectivization in the contemporary global process of authoritative decision or escape from the shackles of the limited conception of international law as a body of rules regulating the interrelations of states. In some frames the notion of community is truncated or imprecise, not permitting either comprehensive or detailed description. Many conceptions of effective power stop short with the nation-state as participant, and ignore authority as an important base of power transnationally. Most frames define authority either in transempirical (religious or metaphysical) terms or in ambiguous, tautological syntactic reference, encouraging endless verbal disputations about the true source of the "obligation" or "binding force" of international law. Many frames can conceive of control as emanating only from organized and centralized governmental structures, thus foredooming inquiry at both international and national levels. The futility of each major, inherited frame may be noted.

The oldest frame of jurisprudence, commonly described as that of "natural law," deriving from times when religion and notions of physical nature were often merged with law, did achieve conceptions of a larger community of humankind and of a common human nature and, hence, make immense contribution to the development of transnational perspectives of law. The conception of authority propounded by this frame was, and is, however, characteristically in terms of religious or metaphysical references, admitting of diametrically opposite interpretations, and, on the rare occasions when the control dimension of power is addressed, the conception of control put forward is observable only in appeals from naked power. The frame does not focus squarely upon common interest as a

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15. H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRITISH YEARBOOK OF INT'L L. 1 (1943), *reprinted in* H. LAUTERPACHT, INTERNATIONAL LAW (collected papers, E. Lauterpacht ed. 1975); T.C. ASSER INSTITUTE, INTERNATIONAL LAW AND THE GROTIAN HERITAGE 1985 (a commemorative colloquium held at The Hague, 8 April 1983 on the occasion of the Fourth Centenary of the Birth of Hugo Grotius).

16. J. STONE, VISIONS OF WORLD ORDER (1984).

guide to decision and characteristically makes unverified assumptions about human nature (social or asocial) and by logical derivations from such assumptions seeks to establish a body of prescriptions relating to world public order, including peace. The greatest difficulties for world public order are created by this frame when assumptions about the nature of individuals are transposed to territorial communities and such entities are believed to have absolute, unmodifiable attributes of equality, independence, and sovereignty.

The positivist frame, in contrast with natural law, assumes that the several nation-states constitute the principal communities of humankind and that whatever transnational community exists, if any, is composed only of these nation-states. The conception of law propounded by this frame, in an ill-defined confusion of both authority and control, is in terms of rules established by nation-state officials, as developed from an earlier version of the commands of the sovereign. Since the devotees of this theory can observe no global "sovereign," with centralized legislative, executive and judicial institutions and officials, their theories by definition preclude a conception of international law as law. Indeed, the more bold devotees of this frame flatly assert, in obedience to John Austin's specifications, that international law is not law. A second version of this frame, described as "dualist," asserts that, though both national law and international law are equally law, they have a completely different set of decision-makers, policies, structures, and procedures. A third version, known as "monism," finds authority, not in a "sovereign" decision-maker, but in some postulated global *grundnorm*, located in either agreement or custom, and asserts that this *grundnorm*, by some mysterious derivational magic, without regard for effective power, dictates the content of the law both of the larger community and of all its lesser communities. It will be noted that these two latter versions of the positivist frame both build upon the assumption that international law is merely a body of rules that govern the interrelations of states. These rules are to be found, in theory, largely in the *past* practices of states. The goofus bird flies backward because, though it has no care for where it is going, it likes to know where it has been.

The historical frame, with its emphasis upon the parochial uniqueness of every particular territorial community, has had great difficulty in achieving a conception of transnational community. Though this frame does, in contrast with that of natural law, seek to ground law in empirical social process, the conception of law with which it commonly works is that of some mysterious *geist* or spirit, which supposedly in any particular community emanates from its people as does their language, religion, poetry and music. In such an approach, the lines between authority and control are completely blurred, and few proponents of the approach are able to isolate authoritative decision or a comprehensive constitutive process of decision from the whole flow of particular events in which values are shaped and shared. The deep and pervasive determinism in the notion that law is somehow forever fixed by an ineluctable fate at some

point in the past discourages all effort toward innovation and change and renders sterile the various intellectual tasks indispensable to rational decision.

Similarly, the sociological frame, despite its characteristic concern for the scientific study of explanatory factors and social consequences, unhappily takes its basic conceptions of community and law largely from the positivist frame. Too often its notion of community process is confined to activities within the nation-state, in neglect of the whole hierarchy of interpenetrating community processes from local through national and regional levels to the global. It commonly finds authority in rules established by nation-state officials, and even the most realistic proponents of the frame, find control only in organized and centralized institutions. Hence, the conception of international law for this frame continues to be that of a supposed body of rules governing the interrelations of nation-states, in disregard of the role of other participants in transnational community and power processes and without clear focus upon authoritative decision transcending state lines. The scientific study in any community of the causes and consequences of "rules," without clear relation to decision, is a difficult task, and can scarcely be expected to contribute greatly to the maintenance or improvement of world constitutive process and public order.

The particular policies and procedures developed, under the aegis of these inherited theories about international law, for the control of major coercion and violence, sometimes called force, were most primitive.[17] There have, of course, for some centuries been reasonably observed policies for the protection of diplomats and facilitation of diplomacy; for the making, application, and termination of international agreements; for the protection of nationals abroad from abuses by other states; and for the peaceful settlement of disputes, as through conciliation, mediation, and arbitration. With respect to the more direct control of major coercions and violence, the policies and procedures developed were, however, far from being adequate or consistently observed. The most important effort to control major coercion and violence, with roots reaching far back into the Middle Ages, derived from a distinction between just and unjust wars.[18] The basic thrust of *bellum iustum* was that resort to major violence could be regarded as legitimate self-help only for certain objectives, such as redressing a received wrong, a wrong "serious and commensurate with the losses the war would occasion" and which could not "be repaired or avenged in any other way." The effective power of the Papacy made possible some centralized administration of so general a concept of necessity and consequentiality. Yet even this modest effort to control major coercion and violence fell before changes in community and effective

17. MCDOUGAL & FELICIANO, *supra* note 10, chs. 1 and 3; H. Waldock, *The Regulation of the Use of Force Between States*, 81 HAGUE RECUEIL DES COURS, 1952-II, at 455.

18. J. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY (1981).

power processes in the eighteenth century, and by the nineteenth century, the requirement of *bellum iustum* was brought to an unobtrusive demise.

In the nineteenth and early twentieth centuries, resort to coercion came to be regarded as a prerogative of sovereignty, the legitimacy of which non-participating states were not competent to judge. In the international law of the time, as Eugene Rostow has written, "war was the sport of princes and the privilege of states, and could be undertaken for power, glory, revenge, or many reasons beyond considerations of self-defense."[19] International law offered no general prohibition of violence and made no clear distinction between impermissible and permissible coercion. It attempted only the regulation and the humanitarization of violence once violence had in fact been initiated. Contending belligerents were regarded as upon a plane of "juridical equality" and third states that chose not to participate were said to be under a duty of "neutrality." In deep paradox, though states were said to have a fundamental right to independent existence, there was no prohibition against states waging war and destroying one another. Decisions were to be taken by the relative strength of states and violence was permissible, not only for self-help and self-vindication in the conservation of values, but also for effecting changes in the international distribution of values. In only less paradox, a few authoritative prescriptions purported to govern the employment of minor coercions, limited in dimension and objective, sometimes labelled as "retorsion," "reprisal," "intervention," or "pacific blockade," and so forth, and generally categorized as "measures short of war." Any such governance was of course illusory: the initiating state could at any time designate its operations as "war" and avoid the thrust of limitation.

The movement in the twentieth century toward a general prohibition of major coercion and violence, and toward a collectivized administration of that prohibition, is traceable through the Covenant of the League of Nations, the Pact of Paris, and the Nuremberg verdict, with culmination in the core provisions of the United Nations Charter.

It requires only brief note that for centuries international law purported to offer little protection to the citizens of a state against that state. Traditional law exhausted its concern for human rights with the modest protection afforded aliens.[20]

VI. THE CONTEMPORARY AUTHORITATIVE POSTULATION OF BASIC PUBLIC ORDER GOALS

In 1945, spurred by the "rising, common demands" of individual human beings from every corner of the globe to be free from "the scourge of war" and for greater participation in the shaping and sharing of all the values of human dignity, the framers of the United Nations Charter ef-

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19. Rostow, *Disputes Involving the Inherent Right of Self- Defense*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 264, 283 (L. Damrosch ed. 1987).

20. C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967).

fected two revolutionary changes in historic international law: in core provisions, the Charter postulated, and authoritatively prescribed, both a general prohibition of the unauthorized employment of major coercion and violence and a new protection of the fundamental human rights of individuals, even against their own states.[21] In its preambular clauses and the statement of goals in Article 1, the Charter clearly recognized the intimate interdependence, if not identity, of peace and human rights and made the protection of human rights coordinate with the maintenance of peace. In Article 2(3) the Charter prescribed: "All members shall settle their international disputes by peaceful means in a manner that international peace and security, and justice, are not endangered."

The most difficult problem for law in any community, a problem greatly magnified in the global community by gross inequalities in the distribution of effective power, is that of characterizing and minimizing unlawful coercion and violence. In Articles 2(4) and 51, and certain auxiliary articles, the United Nations Charter makes an indispensable distinction between impermissible and permissible coercion and violence and projects a set of complementary prescriptions, whose unitary and overriding policy is that of protecting and promoting peaceful change.

The most important of the new policies, that of a general prohibition of unauthorized major coercion and violence, is stated very broadly in Article 2(4), which reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

It was, however, recognized that in the still primitively organized global community, offering only modest expectation of the capability of the general community for protecting its members, some right of self-defense by states is indispensable to the maintenance of even the most modest minimum order. Hence, Article 51 of the Charter reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . . ."

The historic right of states to self-defense did not require them, like sitting ducks, to await armed attack, and it is clear, despite occasional literalist interpretations, that the framers of the Charter had no intent to preclude response to *imminent* attack and to impose suicide. The most rational construction of these complementary policies contraposed in Articles 2(4) and 51 would appear to be: the right of self-defense established by the Charter, as in traditional practice, authorizes a state which, being the target of activities by another state, reasonably decides, as third-party observers may later determine reasonableness, that such activities require

21. The first of these developments is described in MCDOUGAL & FELICIANO, *supra* note 10, ch. 3; the second in MCDOUGAL, LASSWELL & CHEN, *supra* note 2, ch. 4.

it to employ the military instrument to protect its territorial integrity and political independence, to use such force as may be necessary and proportionate to its defense.[22] The employment of force that creates this expectation in a target state is in violation of Article 2(4) and is commonly characterized as "aggression," the unlawful complement to lawful self-defense.

Learning from the obvious difficulties in Grotius' *dédoublement fonctionnel* and the failures of the League of Nations, the framers of the Charter projected, for the detailed administration of this basic distinction between impermissible and permissible coercion and violence, a highly collectivized and centralized structure of decision-making. Thus, in Article 24(1) the Security Council, with its veto for the protection of permanent members, was accorded "primary responsibility for the maintenance of international peace and security," and the members agreed that the Security Council, "in carrying out its duties under this responsibility," acted on their behalf. In other chapters of the Charter, elaborate provision was made both for the peaceful settlement of disputes and for employment of organized community force in the maintenance of public order. In Article 39 the Security Council was authorized to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to recommend or take appropriate measures "to maintain or restore international peace and security." In other articles possible measures, of varying intensity in coercion, are outlined in detail. The capstone Article 25 provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

The United Nations Charter, despite all its emphasis upon the importance of (and modest prescription about) human rights, does not itself project a comprehensive and detailed bill of human rights. This gap in constitutive prescription has, however, been remedied by a sequence of cumulative subsequent developments. Building upon the provisions of the Charter, the main features of a comprehensive global bill of rights have been prescribed, if not yet effectively applied, through a whole host of authoritative communications, including The Universal Declaration of Human Rights (now largely customary law); The Covenant on Political and Civil Rights; The Covenant on Economic, Social and Cultural Rights; The Genocide Convention; and multiple specialized and regional pacts; as well as by national constitutions and the vast flow of judicial and other decisions that create the expectations of customary law. The outcome is, thus, an authoritatively prescribed global bill of human rights entirely comparable in content and reach to that maintained in contemporary, more mature national communities.[23] It embraces the fundamental policies that underlie all law in any community that seeks a genuine clarifica-

22. The detailed application of this test is outlined in MCDOUGAL & FELICIANO, *supra* note 10, ch. 3.

23. This thesis is documented in MCDOUGAL, LASSWELL & CHEN, *supra* note 2, ch. 4.

tion of the common interests of its members. A world public order of human dignity may endure many variations in the practices by which particular values are shaped and shared if major value goals are kept compatible and all practices are evaluated and accommodated by the criteria of common interest.

VII. TRENDS IN PAST ACHIEVEMENT OF BASIC GOALS

It is common knowledge that the highly collectivized and centralized structure of decisionmaking projected by the United Nations Charter for characterizing and minimizing major coercion and violence was stillborn. So complex an administrative structure, requiring the careful coordination of member states, could not survive the vast disparities in the effective power and interests of member states and the mounting intensity of the struggle between an expansive totalitarian public order and an opposing order at least aspiring toward the values of human dignity. As the horrors of worldwide war have receded, the perception and clarification of a common interest between the contending orders has become more and more difficult.

In consequence of this failure of the projected centralized structure of decisionmaking, the larger community of humankind has been thrown back, for making the difficult distinction between impermissible and permissible coercion and violence, upon Grotius' ancient *dédoublement fonctionnel*, in which the several states themselves make the necessary evaluations and undertake appropriate sanctioning measures. In such a context it cannot be surprising that states commonly make the evaluations in terms of their own special interests, including the interests of the public order to which they adhere. It is not believed, however, that the great bulk of humankind, taken as individuals, have abandoned their demand to be free from the "scourge of war," or have lost the realistic expectation that some stable, uniform administration of the distinction between impermissible and permissible coercion and violence is indispensable to even minimum attainment of a law-governed global community. The states of the world, and the whole of humankind as expressed through the many media of world public opinion, do continue to challenge and evaluate the behavior of states by the criteria of Articles 2(4) and 51. The hope would appear to remain that more centralized and more effective procedures for the administration of an indispensable policy can still be achieved. In the light of such expectations and hope, it can scarcely be said, with realism, that Articles 2(4) and 51 are dead and that humankind is again without authoritative prohibition of major coercion and violence.[24] At least for the proponents of a public order of human dignity, the understanding remains that the application of major coercion and violence to the human person is fundamentally incompatible with basic

24. The question is raised by T. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

human rights and that a global community that genuinely aspires toward the values of human dignity must continue to seek to minimize major coercion and violence as an instrument of change, or as an instrument obstructing peaceful change.

A principal obstacle to the uniform application of Articles 2(4) and 51 has been in the insistence, from the beginning, by the Soviet Union that "wars of liberation" are not subject to Article 2(4). This concept, designed to facilitate totalitarian expansionism, is derived from an earlier idiosyncratic distinction between "just" and "unjust" wars. The distinction reads:

> (a) *Just* wars, wars that are not wars of conquest but wars of liberation, waged to defend the people from foreign attack and from attempts to enslave them, or to liberate the people from capitalist slavery, or, lastly, to liberate colonies and dependent countries from the yoke of imperialism; and
> (b) *Unjust* wars, wars of conquest, waged to conquer and enslave foreign countries and foreign nations.[25]

In more modern formulation the concept and its justification are thus stated by Professor Tunkin:

> Modern international law also provides for the right of colonial peoples and dependent countries to use armed force against metropolies interfering with efforts of the peoples of corresponding countries or territories to realize their right to self-determination. Such use of armed force is also a justified form of self-defence. While in a general form that proposition follows from the United Nations Charter itself, it finds more concrete expression in numerous international documents, including the Geneva agreements of 1954 concerning Indochina, and numerous resolutions of the United Nations General Assembly, especially in the Declaration on Principles of International Law of 1970.[26]

This alleged exception to Article 2(4) has, as is well known, been employed by the Soviets to justify interventions in many countries in Europe, Asia, Africa, and Latin America.

In supplement to this alleged exception from Article 2(4) of "wars of liberation," the Soviets have in relatively recent times sought to establish an allied exception known as the "Brezhnev Doctrine." This doctrine is designed to justify Soviet intervention in states already "socialist" to preclude their choice to become other than socialist. In its most authoritative statement, this doctrine reads:

> There is no doubt that the peoples of the socialist countries and the Communist Parties have and must have freedom to determine their

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25. History of the Communist Party (Bolsheviks), Short Course 167-168 (Commission of the Central Committee of the C.P.S.U.(B) ed. 1939), as quoted in MCDOUGAL & FELICIANO, *supra* note 10, at 186.

26. G. TUNKIN, LAW AND FORCE IN THE INTERNATIONAL SYSTEM 85 (1983).

> country's path of development. However, any decision of theirs must damage neither socialism in their own country nor the fundamental interests of the other socialist countries nor the worldwide workers' movement, which is waging a struggle for socialism. This means that every Communist Party is responsible not only to its own people but also to all the socialist countries and to the entire Communist movement. Whoever forgets this in placing sole emphasis on the autonomy and independence of Communist Parties lapses into one-sidedness, shirking his internationalist obligations.[27]

The statement adds:

> Each Communist Party is free in applying the principles of Marxism-Leninism and socialism in its own country, but it cannot deviate from these principles (if, of course, it remains a Communist Party). In concrete terms this means primarily that every Communist Party cannot fail to take into account in its activities such a decisive fact of our time as the struggle between the two antithetical social systems — capitalism and socialism.[28]

The violence with which this doctrine has been, and is being, applied in Eastern Europe and elsewhere needs no new description. The totality of these claims for exception from Article 2(4), through both wars of liberation and the Brezhnev Doctrine that the Soviet Union asserts is aptly summarized by Professor Michael Reisman:

> The Soviet claim was and continues to be that, the U.N. Charter notwithstanding, the Soviet Union maintains the right to support those struggling against existing governments if their struggle is consistent with historical laws, of which the Soviet government is the exclusively authorized interpreter. If the groups succeed, the Soviet Union has the additional right and obligation to make sure that their members and constituents do not change their minds in the future. A scholar of no less stature than Professor Tunkin has sanctified the doctrine as a *jus cogens*.[29]

Incredibly enough, the International Court of Justice in the recent *Nicaragua* case would appear, perhaps maladroitly, to have conferred its authority upon "wars of liberation."[30] At one point in its opinion, the

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27. Kovalev, *Sovereignty and the International Obligations of Socialist Countries*, Pravda, September 26, 1968, *quoted in* MCDOUGAL & REISMAN, *supra* note 4, at 176.

28. *Id. See also* Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 YALE J. WORLD PUB. ORD. 209 (1981).

29. Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 188 (1988).

A possible change in Soviet attitudes toward both "wars of liberation" and the Brezhnev Doctrine is indicated in M. Gorbachev, *Reality and Safeguards for a Secure World*, Sept. 17, 1987, U.N. Doc. A/42/574, S/194143 (Sept. 18, 1987). Unhappily, there would appear to be some dissension in the ranks. *See Gorbachev Deputy Criticizes Policy*, New York Times, Aug. 7, 1988, at 11, col. 1. Even Mr. Gorbachev himself sometimes wavers. See *Dissenters Stay Silent*, The Times (London), July 15, 1988, at 6, col. 6. The changes under way would appear to be in the direction of greatly improved world public order.

30. Case Concerning Military and Paramilitary Activities in and Against Nicaragua

Court in piety, as excessive as impossible, declares its complete neutrality between contending systems of world public order. It writes:

> The finding of the United States Congress also expressed the view that the Nicaraguan Government has taken "significant steps towards establishing a totalitarian Communist dictatorship." However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural systems of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.[31]

Yet in its holding the Court finds in the acknowledged hostilities of Nicaragua against El Salvador no "armed attack" against El Salvador or even threat of "armed attack" against El Salvador or any other state; hence, it denies the United States the right to participate in the collective defence of El Salvador and legitimizes the factual intervention by Nicaragua. As Judge Schwebel writes, in dissent, this was in substance to honor "wars of liberation."[32] Judge Schwebel, finding the errors of the Court conspicuous, writes:

> The Court appears to reason this way. Efforts by State A (however insidious, sustained, substantial and effective), to overthrow the government of State B, if they are not or do not amount to an armed attack upon State B, give rise to no right of self-defence by State B, and hence, to no right of State C to join State B in measures of collective self-defence. State B, the victim State, is entitled to take counter-measures against State A, of a dimension the Court does not specify. But State C is not thereby justified in taking counter-measures against State A which involve the use of force.[33]

He adds confirmation of his interpretation by noting a negative inference from an earlier reference by the Court to "wars of decolonization," a kind of war not involved in the case. Thus, while professing not to be able to create a double standard, by its decision the Court in fact creates a double standard in favor of an expansive totalitarianism.[34] The question before the Court was not whether Nicaragua's choice of a public order was "a violation of customary international law," but whether Nicaragua's attacks upon its neighbors were in accord with conventional and custom-

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(Nicar. v. U.S.) 1986 I.C.J. 14.

31. *Id.*, para. 263.

32. Dissenting Opinion, para. 174-81.

33. *Id.*, para. 175.

34. *Id.*, para. 178, referring to paragraph 206 of the Judgment of the Court.

ary international law.[35]

The decision and opinion of the International Court of Justice in the *Nicaragua* case, most unhappily, raises grave questions about the capabilities of a judicial body, under the contemporary circumstances of contending world public orders, to make rational decisions in the common interest about the regulation of major coercion and violence. At the jurisdictional phase of the case,[36] the Court held, contrary to all prior law, that it had jurisdiction over a state that had not consented to such jurisdiction, and in favor of a state that had no standing to sue except by the most factitious creation of the Court. At the merits phase, the Court demonstrated that it had few capabilities for discovering or recognizing the facts relevant to rational decision, and even less capabilities for evaluating such facts by the criteria that much of the world regards as expressed in the United Nations Charter and customary international law.[37] Hersch Lauterpacht could have been right in his famous insistence that in the abstract no dispute between human beings is inherently non-justiciable.[38] His conclusion can, however, have little relevance to a struggle between contending world public orders in which all common interest, beyond bare human survival, seems at times to have disappeared.[39]

It should be no cause for wonder, in an infectious deterioration of policies and procedures for the regulation of major coercion and violence, that the United States, as a principal proponent of a public order of human dignity, should begin in measure, for self-help, to adopt policies

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35. My criticism of the Court is both of its holding that an actual "armed attack" by Nicaragua upon El Salvador was necessary before the United States could come to the aid of El Salvador and of its finding that what Nicaragua was doing did not amount to an armed attack upon El Salvador. In the light of this holding and this finding, it does not matter that the Court did not explicitly state that it regarded "wars of liberation" as lawful; by its decision it honored such an expansionist war in fact.

36. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Jurisdiction and Admissibility, 1984 I.C.J. 392.

It should perhaps be noted that the writer was of counsel to the United States Government at this phase of the case.

37. *See* Norton, *The Nicaragua Case: Political Questions before the International Court of Justice*, 27 VA. J. INT'L L. 459 (1987); J. MOORE, THE SECRET WAR IN CENTRAL AMERICA (1987); R. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS (1987).

The decision is discussed, in varying terms of approval and disapproval, in a sequence of comments in *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987). A particularly perceptive comment is that of J. Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135 (1987).

See also H. Almond, Jr., *The Military Activities Case: New Perspectives on the International Court of Justice and Global Public Order*, 21 INT'L LAW. 195 (1987); Macdonald, *The Nicaraguan Case: New Answers to Old Questions*, 1986 CAN. Y.B. INT'L L. 127; Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, 20 VAND. J. TRANSN'L L. 53 (1987).

38. H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933).

39. McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

and procedures parallel to those employed by the Soviet Union. Through the Monroe Doctrine and participation in the Organization of American States the United States has long of course sought to preclude outside states from acquiring territorial power in the Western hemisphere. More recently, Presidents as diverse in general perspective as Kennedy and Johnson have made pronouncements, in content comparable to the later Brezhnev Doctrine, designed to justify interventions against totalitarian expansion into this hemisphere.[40] Even the House of Representatives joined in support of these pronouncements. It resolved that:

> (1) any [international communist] subversive domination or threat of it violates the principles of the Monroe Doctrine, and of collective security as set forth in the acts and resolutions heretofore adopted by the American Republics; and
> (2) in any such situation any one or more of the high contracting parties to the Inter-American Treaty of Reciprocal Assistance may, in the exercise of individual or collective self-defense, which could go so far as resort to armed force, and in accordance with the declarations and principles above stated, take steps to forestall or combat intervention, domination, control and colonization of whatever form, by the subversive forces known as international communism and its agencies in the Western hemisphere.[41]

In contemporary times Presidents Carter and Reagan have extended comparable doctrines to the Persian Gulf and Saudi Arabia.

Another important obstacle to the rational, uniform application of Articles 2(4) and 51 derives from the attempt, as illustrated by the International Court of Justice in the *Nicaragua* case, to cut down the reach of the historic right of self-defense.[42] It is not always recognized that in the global community Articles 2(4) and 51 are as wholly complementary as are the prohibition of violence and the permission of self-defense in mature national communities. Some state officials and scholars have taken the position that Article 51 imposes upon states a higher degree of necessity than that of customary international law and requires states to await the inception of actual armed attack, without option to respond to realistic expectations of imminent attack. This interpretation of Article 51 is based upon an allegedly literal interpretation of the words "armed attack" regarded as an isolated component of the article. It may be noted, however, that such interpretation introduces the words "only if" into the Article and is contrary to all the important canons for the interpretation of international agreements.[43] The negotiating record indicates that the framers of the Charter sought only, by introducing the words "armed at-

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40. The various pronouncements of United States officials are summarized in Reisman, *supra* note 29.

41. As quoted in Reisman, *supra* note 29, at 177.

42. Rostow, *supra* note 19; O. Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113 (1986).

43. This position is fully developed in MCDOUGAL & FELICIANO, *supra* note 10, at 217, 232.

tack," to immunize regional security arrangements, and especially the Inter-American system envisioned by the Act of Chapullepec, from the jurisdiction of the Security Council. There was no expressed intent to forbid response to threat of imminent attack. The most relevant Committee Report reads: "The use of arms in legitimate self-defense remains admitted and unimpaired."[44] The principle of interpretation by the subsequent conduct of states obviously can give little comfort to those who urge new limitations. Most importantly, the principle of effectiveness in interpretation by major purposes makes the asserted limitation of self-defense to the actual inception of armed attack an absurdity. In an age of increasingly awesome instruments of destruction and highly sophisticated coercion by instruments other than the military, the state that awaits armed attack, can expect only quick transition to oblivion. It defies not merely major purposes, but even common sense, to think that a prescription in effect imposing suicide could either create the expectation, indispensable to law, of its enforcement, or that it could be enforced.

It may be recalled that the United Nations Charter makes the protection of human rights coordinate with, if not inclusive of, its prohibition of unauthorized coercion and violence. It is presently being greatly debated among scholars and others in what degree the core provisions about human rights are, like the provision for self-defense in Article 51, completely complementary with Article 2(4).[45] Most observers agree that the long enjoyed practice of humanitarian intervention, for the protection of a state's nationals and sometimes others, has not been outlawed by Article 2(4). It would thwart reason to hold that a constitutional Charter so greatly emphasizing human rights should be interpreted to abolish an historic remedy so effective in the protection of human rights, a remedy which does not in fact threaten territorial integrity and political independence.

The more intense contemporary controversy centers most directly upon whether it is lawful for one state to interfere (engage or assist in coercion and violence) in the internal affairs of another state for a range of objectives. Unhappily, the discussion is carried on in terms, such as "intervention," "counter-intervention," "civil war," "self-determination," "spheres of influence," "reprisals," "retaliations," and so on, which make so ambiguous a reference to both facts and legal policies that it is often difficult to know what is being asserted. One suggestion appears to be

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44. MCDOUGAL & FELICIANO, *supra* note 10, at 236.

45. *See, inter alia*, Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984); *The Use of Force in Contemporary International Law*, 78 PROC. AM. SOC'Y INT'L L. 74 (1984); *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985); *The Emperor Has No Clothes: Article 2(4) and the Use of Force in Contemporary International Law*, ch. 1 in UNITED NATIONS FOR A BETTER WORLD (J. Saxena and others, eds. 1986) 3; Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984); *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); *International Law in Theory and Practice*, 178 RECUEIL DES COURS, 1982-V, ch. VII, VIII; Cutler, *The Right to Intervene*, 64 FOREIGN AFF. 96 (1985).

that the self-determination of states is the paramount policy of contemporary international law and that the proponents of human dignity may intervene in other states to protect or promote self-determination, even as totalitarian states do in promotion of totalitarian public order. In response other commentators, not always taking a position upon the Soviet claims, insist that such intervention would be in clear violation of the allegedly literal and neutral words of Article 2(4). A counter-response is that the proponents of human dignity may lawfully intervene after, but not before, expansive totalitarians have intervened in a state. In such controversy it is sometimes forgotten that what is involved in all instances is the application of the larger community's fundamental policy, as embodied in Articles 2(4) and 51, against *change* by coercion and violence and that the objectives of a state, whether for expansion or conservation, are among the most important features of the factual context for evaluating the lawfulness or unlawfulness of a state's action.

It has long been urged that the rational application of Articles 2(4) and 51, in clarification of common interest, requires in every instance of challenged coercion and violence, not mere logical derivation from allegedly autonomous (policy neutral) rules, but rather a careful, configurative examination and appraisal of the many relevant features of the larger context of the coercion and violence.[46] In an earlier statement, noting that the relevant features of the context in any instance of challenged coercion and violence were many and complex, we summarized:

> Even the most modest suggestion must include the varying characteristics of the participants, and of their allies and affiliates; the distribution of perspectives of attack and defense, expansion and conservation, deliberateness and coincidence, inclusivity and exclusivity, consequentiality and inconsequentiality; the *locus* of events, as within a single community or transcending different communities, and the geographic range of the impacts of events; the timing of events, and their continuity or discontinuity; the differential distribution of the bases of effective power; the variety and characteristics of the different strategies — diplomatic, ideological, economic, and military — employed; and the various outcomes in intensity and magnitude achieved, of the fact, and expectation, of coercion and destruction of values.[47]

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46. This position is believed to be established in MCDOUGAL & FELICIANO, *supra* note 10, ch. 3.

47. McDougal, *Foreword* to J. MOORE, LAW AND THE INDO-CHINA WAR (1972).

For example, in relevant prescription the customary right to use force in self-defense is limited by the criterion of *necessity* to defend against an imminent, or exercised, use of force against the territorial integrity of a state or its political independence, and by the requirement of *proportionality* of the action taken in self-defense. Thus, the action defended against has to be appraised in its entire context: the participants have to be determined, their objectives (e.g., whether they are expansionist or conservative in nature), the situation of decision, the bases of power behind the activities, the strategies employed, and their immediate outcomes in intensities of coercion. If the activities complained of would lead a disinterested third party to reasonably conclude that use of the military instrument is

It is no revolutionary idea, alien to the common interest that must be effected by all law, that the kind of public order demanded by a state be taken into account in appraising the lawfulness of its acts of coercion and violence. In endorsing this idea, more than twenty-five years ago, Florentino Feliciano and I wrote:

> Lest the contrary impression arise by default, it may be made clear that, in contrast with the quoted Soviet doctrine, we make no proposal for incorporation of a double or multiple standard in the conception of permissible coercion. The policy we recommend is, on the contrary, that of demand for effective universality, for the uniform application to all participants of a basic policy that excludes the acquisition or expansion of values by coercion and violence. In urging the explicit examination of the fundamental public order perspectives of participants, in particular their definitions of the legitimate purposes of coercion, the hope is precisely that decision-makers may thereby escape the double standard which in specific interpretations may be created against those who do not accept as permissible the use of coercion for expansion. We think of the interest to be clarified, the demand for change by noncoercive and nonviolent procedures only, as a general community interest, as the long-term interest of all individual states, and recognize that there must be a promise of reciprocity from states who reject totalitarian conceptions of world order.[48]

What the proponents of a public order of human dignity cannot accept is that a double standard be established that discriminates in favor of expansive totalitarianism.

VIII. THE CONDITIONS AFFECTING ACHIEVEMENT OF BASIC GOALS

By considering the conditions that have affected past failures in humankind's achievement of a stable minimum public order, an observer may be able to feed back to the clarification of goals, enhance understanding of past trends, and prepare for the projection of probable futures and a more rational choice among policy options. The conditions that have affected past failures are commonly described, at high level abstraction, in terms, first, of the contemporary anarchy of multitudinous states, exhibiting both a most uneconomic relation of peoples to resources and immense differences in effective power, and secondly, of the continuing struggles between contending systems of world public order, expres-

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urgently required to protect the target country's territorial integrity and political independence, then the target country may employ force in a reasonably proportionate response — the proportionality of the defensive action, again, being determined through comprehensive contextual analysis.

Such a contextual examination of the events in the Nicaragua case would reveal the Soviet Union and Cuba as participants along with the Sandinistas and would note the expansionist nature of their objectives. For an outline of the necessary examination and appraisal in a comparable case, see M. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963).

48. MCDOUGAL & FELICIANO, *supra* note 10, at 187 n.156.

sing diametrically opposed conceptions of the relation of the individual human being to the state. To make this high level description of overriding conditions meaningful, however, it must be given operational indices in terms of a maze of interacting predispositional and environmental variables.[49] The predispositional variables are the subjectivities of individual human beings, including their demands for values, their identifications with others, and their expectations about the context of interaction; these relevant subjectivities may be organized by employment of the maximization postulate, that individuals adopt one response rather than another when they expect to be better off in terms of all their values by the response chosen. The environmental variables are the features of the larger community context, which both condition and constrain predispositions. These environmental variables may economically be described in terms of population, resources, institutions, and outcomes in value shaping and sharing. A most convenient way of achieving comprehensive description of any community process, it may be recalled, is in terms of individual human beings, with varying patterns of demand, identification and expectation, employing resources, through institutional practices, for maximization of value outcomes.

It has already been noted that a most important variable in the contemporary global process of effective power is what is commonly referred to as "the rising, common demands" of peoples for greater participation in the shaping and sharing of all the basic values of human dignity. Different peoples, conditioned by differing cultural traditions and modes of social organization, may of course pursue and achieve the same basic values through different modalities and nuances in institutional practice. Unhappily, in a world of contending public orders and immense contrasts in development, peoples nurtured in differing parochial communities may tend to express special, rather than common, interests. Unable to clarify and agree upon common interests, peoples often become preoccupied with short-term, immediate payoffs rather than long-term consequences. It is possible that as the respect revolution accelerates, people's demands for new participation in the different value processes will become more realistic in recognition of the need for reciprocity and common interest. The universalizing demands of individuals for greater participation in all value processes can be expected to continue to affect all effective and authoritative decision.

The identifications upon behalf of which demands for values are asserted today range from the whole of humankind to small parochial groups. The earliest parochial identifications with the family and the tribe were broken, in part, by the advent of cities, facilitating the later identifications with larger states. In more recent times, the "nation-state" has been the symbol about which individuals could organize their collec-

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49. These variables are outlined and described in some detail in MCDOUGAL, LASSWELL & CHEN, *supra* note 2, at ch. 1.

tive identifications, and most states have of course sought to inhibit more inclusive identifications that might limit their power. It would appear, however, that the potentialities for individuals to acquire and sustain more inclusive identifications, at least for the promotion of minimum order, are strengthening. The increasing tempo of interaction in all value processes around the globe, facilitated by modern communication and transportation, allows an individual not merely to change geographic location, but also to change "place" through identifications with many different functional groups. Individuals who participate in a vast global network of territorial and functional activities may be able better to identify with a common humanity and to demand its common interest.

The expectations of the peoples of the world about the conditions that affect minimum public order and their individual security, the expectations that in turn affect all effective and authoritative decision, vary tremendously in comprehensiveness and realism. The greatest contemporary failure in realism is in the lack of appreciation of the comprehensiveness and depth of the interdependences, affecting both minimum and optimum order, of all peoples everywhere with regard to the shaping and sharing of all values. No less importantly, in a world in which the giant powers continuously balance weapons capable of instantaneous global destruction, most peoples, elite and rank and file alike, are obsessed by a pervasive expectation of violence that affects all choices among alternatives in value shaping and sharing. Fortunately, the spread of new techniques of communication and modern education make it possible for individuals everywhere to acquire a new realism about the conditions, not merely of continued existence, but of improved public order. As the network or interaction and the perception of interdependence expand, more and more peoples may come to perceive that the assertion of special interest, against common interest, is not compatible with survival. Some of the more important environmental variables that characterize the contemporary global community process, affecting all public order, may be indicated in the following tabular, if somewhat anecdotal, form:[50]

1. Security

Continuing confrontations of the major powers, with rising expectations of violence. Threats of nuclear destruction and of chemical and biological warfare. The acquisition of contemporary instruments of destruction by smaller powers. The rise and spread of private violence and terrorism.

2. Population

The accelerating rate of increase in population growth. The uneven distribution of peoples in relation to resources and increasing barriers to migration.

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50. This presentation is adapted from McDougal, *International Law and the Future*, 50 MISS. L. J. 259 (1979).

3. Resources

The spoilation, pollution, and exhaustion of resources at an accelerating rate. Increasing violation of physical and engineering unities in the use of resources. The growing monopolization of sharable resources, with restraint upon scientific inquiry about resources. The promise and threat of both deliberate and accidental climate and weather modification. The continuing diversion of important resources to destructive purposes.

4. Institutions

The antiquated nation-state structures, with their disregard of physical, engineering, and utilization unities. The continuing weakness of international governmental organizations. The lack of development of functional transnational associations devoted to values other than power and wealth. The relative immunization of wealth and other private associations from transnational authority.

5. Particular Value Processes Within Global Community Process

(1) Power

The retreat of democracy and rise of totalitarianism within many different communities. The increasing centralization, concentration, and bureaucratization of power even within nominally democratic communities. The increasing monopolization of the effective bases of power within different communities.

(2) Wealth

The continued prevalence of individual poverty. Unequal distribution of wealth both within and across community lines. Inadequate regulation of transnational monetary units. Governmental interferences with private trade. Arbitrary seizures and confiscations of property rights. Irrational allocations of resources and unequal development. Continuing cycles of depression and inflation.

(3) Respect

Widespread denials of individual freedom of choice about social roles. Increasing individual differentiations and group hatreds upon grounds (race, sex, religion, language, national origin) irrelevant to individual capabilities and contributions. Massive encroachments upon individual autonomy and privacy through modern technology and increasing governmental bureaucratization.

(4) Well-Being (Health)

Continuing high mortality rate and low life expectancy in many parts of the world. Increasing threats of famine, epidemics, and disease. Indiscriminate mass killings in armed conflict and other interactions. Unexplained disappearances. The globalization of the practice of torture as a deliberate instrument of policy.

(5) Enlightenment

Continuing high rates of illiteracy and differential access to information in many communities. Deliberate fabrications and disseminations of misinformation. Wholesale indoctrinations and brainwashings. The withholding and suppression of the information necessary to independent appraisals of policy.

(6) Skill

The unequal distribution of skills in modern technology and the rapid obsolescence of skills by changes in technology. The brain drain from the developing countries to the developed. Restrictions upon the freedoms of skill groups to organize and to function.

(7) Affection (Loyalties)

The requisition of loyalties in the name of the state and the undermining of more universal loyalties. Severe restrictions upon freedom of association. Governmental frustration of congenial personal relations and employment of social ostracism as sanctions.

(8) Rectitude

Denials of freedom to worship and choose secular criteria of responsibility. The politicization of rectitude. Restrictions upon association for religious purposes and intolerance and persecution of religious minorities. The rise of messianic religious fundamentalism.

The intense interdependences among all the predispositional and environmental conditions make it possible to effect changes in the larger global community process, including movement toward a more stable minimum public order, by making changes in, and managing, the various particular conditions.

IX. POSSIBLE FUTURE DEVELOPMENTS

Law is interested in the past and the present in aid of inventing and making the future. Even in relation to a problem as difficult as that of establishing and maintaining a stable minimum world public order, the projection of possible futures, when inspired and disciplined by knowledge of past trends in achievement and their conditioning factors, may serve to stimulate creativity in the invention and evaluation of improved alternatives in decision. One procedure for inquiry about the future, invented by the late Harold Lasswell some fifty years ago, is that of deliberately formulating provisional maps of "developmental constructs" of future possibilities that range through a broad spectrum from the most optimistic to the most pessimistic.[51] When this method of inquiry is applied to the problem of minimum world public order, the contrast in rival constructs is stark.

The most optimistic construct projects increasing progress toward a wider and more responsible sharing of power and a greater production and wider sharing in all the values of human dignity among the peoples of the world. This construct builds upon various assumptions about predispositional and environmental variables and their interaction. It projects, thus, that the widespread demands of peoples for a greater and more rewarding participation in all value processes will not diminish, but will rather intensify, that the contemporary and largely parochial identifi-

51. H. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (1935); THE WORLD REVOLUTION OF OUR TIME: A FRAMEWORK FOR BASIC POLICY RESEARCH (1951). *See also* Eulau, *H. D. Lasswell's Developmental Analysis*, XI W. POL. Q. 229 (1958); W. ASCHER, FORECASTING: AN APPRAISAL FOR POLICY-MAKERS AND PLANNERS (1978).

cations of peoples may, despite recurrent phases of fragmentation, expand toward recognition, not merely of common humanity, but of shared community, and that peoples will achieve increasingly realistic perception of, and expectations about, their indissoluble interdependences in relation to the shaping and sharing of all values. This construct, considering environmental variables, projects assumptions that the accelerating rate of population growth can be controlled, that the resource-environment of the world can be protected from exhaustion and spoilation, that science and science-based technology can create vast new resources, and that more economic governmental and value-functional institutions can be created, and so on.

The most pessimistic construct regards the direction of history as reversing itself and moving toward an aggregate of militarized and garrisoned communities, controlled from the center and modelled on the prison. This trend could culminate in an all comprehensive, single totalitarian state, with a system of public order that, when finally entrenched, organizes the global community into a vast hierarchical pattern under the rule of a self-perpetuating military caste. This construct builds upon the assumptions, among predispositional variables, that the peoples of the world will not be able to clarify their genuine common interests, but will rather pursue short-term special and exclusive advantages, that the identifications of peoples will remain territorially bound and parochial, rather than extending to a common humanity, and that peoples' expectations will in general remain diffuse, truncated, and unrealistic, and include, in particular, an anticipation that violence will be so high and pervasive as to provide a chronic justification for the continuing military mobilization of humankind. The assumptions made in this construct about environmental variables are of course largely the opposite of those that sustain the optimistic construct.

Whatever mid-abstraction constructs may be drawn between these two extremes, most observers today agree that contemporary world public order is undergoing transformations of unprecedented magnitude and scope and that such change is likely to continue at an accelerating rate. Happily, it is not necessary to regard any particular developmental construct as inevitable in outcome. The future may, in ways about which we do not yet know, be inevitable, but statements about the future, made in light of present knowledge, cannot fathom the inevitable and may be accorded differing degrees of probability, subject to change. It is this indeterminacy of the future that presents the proponents of a world public order of human dignity with the opportunity, as well as the desperate necessity, to refashion the global constitutive process of authoritative decision in modalities better designed to secure both minimum public order and other community demanded values.

X. ALTERNATIVES FOR AN IMPROVED WORLD PUBLIC ORDER

It may aid understanding of the need for a comprehensive approach to recall the intimate interrelations within the global community process

(interrelations emphasized in our opening paragraphs about the larger context) of effective power, the constitutive process of authoritative decision, and the public order achieved in the protection of demanded values. It is the global process of effective power that establishes and maintains, as one of its components, the global constitutive process and, hence, identifies the basic policies to be sought in authoritative decision. It is the global constitutive process that establishes and maintains the larger community's most minimum order, in the sense of prohibiting and regulating major coercion and violence, and aspired optimum order, in the sense of promoting the greatest production and widest sharing of all demanded values, and it is upon this existing, contemporary constitutive process that observers and decision makers who would promote peace, whether conceived in a minimum or optimum terms, must eventually focus their recommendations for change and improvement. Yet, through a grip of converse determination, effective power in the global community may be based upon participation in any and all the value processes other than power (wealth, enlightenment, respect, well-being, skill, rectitude, loyalty), and the kind of constitutive process the larger community of humankind can achieve is highly dependent upon the kind of public order it can establish in relation to all values. In consequence of all these intense interdependences in effective and authoritative decision and in choices in particular value processes, movement toward (or away from) both minimum order and optimum order in global community process may be affected, and managed, by decisions and choices about any feature of the larger community process.

The task of highest priority, for all who are genuinely committed to the goal values of a world public order of human dignity, would accordingly, appear to be that of creating in the peoples of the world the perspectives necessary for accelerated movement toward a more effective global constitutive process of authoritative decision. It has already been indicated that it is in the conflicting, confused, and disoriented perspectives of peoples — as manifested in exorbitant demands for special, rather than common, interests; in syndromes of parochial, exclusive identifications; and in chronically unrealistic expectations about the larger context — and not the inexorable requirements of technologically malleable environmental variables, that perpetuate the existing conditions of contending world orders and appalling threat to the whole of humankind.

The optimalization postulate (that individuals act within their capabilities to maximize their values), and the many historic successes of law as an instrument for the clarification of common interest, would suggest that by appropriate modifications in perspectives the peoples of the world can be encouraged to move toward both the establishment of more effective decision process and the making of more rational specific decisions about public order values. It is hardly a novel thought that the factors — culture, class, interest, personality, and crisis — which importantly condition peoples' perspectives can be modified to foster constructive rather than destructive perspectives. The distinctive perspectives that must be

created in promotion of a more viable global constitutive process include, as indicated above, a trilogy of demands, identifications and expectations. The demands that require strengthening are those that insist upon the greater production and wider sharing of all human dignity values and which emphasize the protection of common rather than special interests. The identifications that require enhancement are those that most nearly embrace the whole of humankind and achieve increasing pluralistic expression in both territorial and functional groupings. The relevant expectations must include the recognition that all peoples, everywhere, are irrevocably interdependent for securing all values, even survival, and that all peoples, without exception, have more to gain and less to lose, for themselves and all with whom they identify, by the establishment and maintenance of a secure global minimum order, rather than by exercise of unilateral coercion and violence. The task for proponents of a world public order of human dignity is, in particular, that of establishing credible expectations that they do genuinely accept the basic policy of minimum order, that coercion and violence are not to be used for change, or to obstruct peaceful change, and that they are willing reciprocally to accord the benefits of this policy even to those who do not share their vision of world order. The contemporary technology of communication and collaboration, fortunately, makes possible the widespread generation and communication of these relevant perspectives.

There are of course multitudinous modalities in institution and policy that might be employed, if appropriate perspectives could be created in the peoples of the world, to improve the existing global constitutive process of authoritative decision toward a more secure, free, and abundant world public order.[52] For centuries philosophers, clerics and kings have proffered plans for perpetual peace, and contemporary proposals abound for various forms of world government and lesser modifications of prevailing institutions and practices. The difficulty with the proposals envisaging grandiose transformations in existing structures and practices is that they seldom consider the means necessary to translate the vast changes they propose into reality. The difficulty with the more modest proposals is that they are fragmented and anecdotal in form, dealing with isolated features of rule or procedure or structure, and are not put forward in appropriate relation to the processes of effective power and authoritative decision which they are designed to affect. What is urgently needed, in more rational approach, is the creation of competent agencies, both public and private, for undertaking a systematic canvass of every

52. For an introduction to the literature, see B. FERENCZ, A COMMON SENSE GUIDE TO WORLD PEACE (1985); B. FERENCZ, THE INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES, COMMON SECURITY: A BLUEPRINT FOR SURVIVAL (1982); R. FALK, THE END OF WORLD ORDER (1983); MCDOUGAL & FELICIANO, *supra* note 10, ch. 4; J. MIKUS, BEYOND DETERRENCE: FROM POWER POLITICS TO WORLD PUBLIC ORDER (1988); S. MENDLOVITZ, ON THE CREATION OF A JUST WORLD ORDER: PREFERRED WORLDS FOR THE 1990'S (1975); J. PERKINS, THE PRUDENT PEACE (1981); Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L. J. 969 (1975).

feature of effective power, constitutive process, and public order decision to ascertain a wide range of possible improvements and to establish priorities among potential improvements in terms of relation to human dignity values, temporal need and acceptability, economy, and effectiveness.[53]

It is most unlikely, so long as the contention between rival systems of world public order intensifies, that the major states of the world can be persuaded to take important steps by agreement toward the greater collectivization and centralization of the existing global constitutive process. It is too difficult to clarify a common interest between a public order dedicated to expansion by major coercion and violence and those who regard change by peaceful procedures only as indispensable to any law and stable public order. The most that the proponents of a world public order of human dignity may now be able to do would appear to be to achieve and promote enlightenment about the conditions of minimum order, the potentialities of an optimum world public order, and the policies and measures that might, through appropriate interpretations of existing agreements and the uniformities of customary law, gradually move humankind toward the necessary changes in global constitutive process. Such a stance may be criticized as mere incrementalism, in a situation of desperate need, but it could be made an incrementalism guided by a clear vision of basic goals and a realistic understanding of the conditions of their achievement.

In the absence of comprehensive and detailed studies, it is difficult to offer definitive illustration of the changes in policies and measures that might transform the existing global constitutive process into a more effective instrument of minimum and optimum order. It may be remembered that the existing, most comprehensive process includes all the decisions that identify authoritative decision-makers, project the basic policies of the larger community, establish appropriate structures in aid of decision, allocate bases of power for sanctioning purposes, prescribe procedures for the making of particular decisions, and secure the performance of all the different types of decision functions (intelligence, promotion, prescription, invocation, application, termination, appraisal) that are necessary to the making and application of community policy. The significance of any change or improvement in a particular feature of this process must of course depend at any given time upon both the configuration of all other features of the process and impacts from protected features of value processes other than power. It may be possible, however, to make highly impressionistic, even cryptic, suggestions of the kinds of policies and measures that could, in appropriate context, point in the direction of a more secure, free, and abundant world public order.

We proceed phase by phase through the existing global constitutive

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53. It could have been in recognition of this need that the United States Institute of Peace was established.

process.

A. *Participation in Decision Making*

Seek a more genuinely representative and responsible balancing of power through the creation of more rational intergovernmental regional organizations.

Encourage the creation of political parties, pressure groups, and private associations dedicated to all values for participation in transnational activities.

Recognize the importance of the individual human being, as ultimate actor in all organizations, through provision of increasing access to all authoritative arenas.

B. *Perspectives: Basic General Community Policies*

Reinforce commitment to minimum order, that no change be effected by coercion and violence, by explicit recognition of the complementarity of Articles 2(4) and 51 of the United Nations Charter, emphasizing a broad conception of self-defense.

Interpret Article 2(4) of the Charter to prohibit "wars of liberation."

Interpret Article 51 of the Charter to authorize states to take measures in self-defense when attack is imminent, without awaiting the fact of armed attack.

Reinforce commitment to optimum order by consolidating the emergence of a global bill of human rights through appropriate interpretation of the Charter, the major covenants, national decisions, and customary behavior.

C. *Arenas: Structures of Authority*

1. Establishment

Balance structures of authority in geographic range between centralized and decentralized, and integrate in a way to take into account the intensity of impacts within different geographic areas.

Expand the scope and authority of the executive within international governmental organizations.

Staff parliamentary bodies more effectively in aid of intelligence and appraisal functions for the better clarification of policies.

Multiply occasional conferences for employment of the diplomatic instrument in the clarification and projection of policies.

Provide panels of skilled experts for the voluntary adjudication (mediation, conciliation, arbitration) of disputes. With modern technology, these panels could be moved quickly about the world for sessions in convenient locations.

2. Access

In promoting policies of openness and responsibility, aggrieved individuals and groups might be allowed to represent themselves or to be represented by others (including institutionalized omsbudsmen) in a wide range of structures of authority.

Compulsory jurisdiction for adjudication might be increased with respect to matters not involving state security.

D. *Bases of Power*

The promotion of minimum and optimum order might be enhanced by a more pluralistic distribution of both authority and effective control.

1. Authority

Insofar as compatible with the genuine security interests of states, reject claims of "political questions" and "domestic jurisdictions" that immunize activities from legal evaluation.

For the protection of inclusive interests, accord inclusive institutions a more ample competence with respect to the intelligence, promotion, appraisal, and invocation functions; with respect to the prescription, application, and termination functions, accord a broad competence on matters that do not endanger the security of states.

Allocate to the separate states the competence necessary to protect their exclusive interests, and settle conflicts between states by the criteria of reasonableness as determined through a disciplined, systematic examination of the features of the larger context that affects interests.

2. Control

Through coalition, alliance, and regionalization, seek a more rational organization of the control of the resource bases of the earth-space community.

By agreement and unilateral action, reduce the resources being devoted to armaments and military purposes.

Expand multiple networks of transnational associations, governmental and private, to increase the greater production and wider sharing of all the values that affect power, as well as the quality of life.

Encourage educational institutions to increase their inquiries about the conditions, policies, and alternatives necessary to an improved world public order.

Employ the technology of modern communication to promote a world public opinion that demands and sustains a public order of human dignity.

E. *Strategies: Authoritative Procedures*

Seek an appropriate integration in support of public order of all strategies (diplomatic, ideological, economic, and military), with a strong emphasis upon persuasion rather than coercion.

In revival of Chapter VII of the United Nations Charter, collectivize and centralize such coercion as may be necessary and proportionate to the maintenance of public order.

Enhance the diplomatic instrument by minimizing the employment of special majorities and vetoes, other than in relation to matters affecting the security of states, and by rationalizing the law of international agreements.

Maintain free transnational channels of communication for more effective employment of the ideological instrument.

Employ the economic instrument to improve the channels of trade, financial assistance, and development in the greater production and wider distribution of goods and services.

In performance of decision functions, employ the best available scientific procedures in exploration of facts and potential policies, and make findings as dependable, contextual, and creative as possible.

In prescriptive and applicative decision, final characterization of facts and policies should be made deliberate, rational in relation to goals, and non-provocative, employing contextual analysis in evaluation and choice of alternatives.

F. *Outcomes in Particular Types of Decisions*

The culminating outcomes of constitutive process include both the establishment and maintenance of the process itself and a continuous flow of particular decisions affecting all public order values.

1. The Intelligence Function

(gathering, processing, and disseminating information relevant to decision)

Accord international governmental organizations the resources necessary to increase their role in inquiry and communication about the goals, trends, conditioning factors, possible futures, and alternatives relevant to improved minimum and optimum order.

2. The Promotion Function

(taking initiatives and mobilizing opinion toward prescription of community policies)

Encourage, by according appropriate access to authority and other resources, a tremendous expansion of pressure groups and private associations dedicated to mobilizing the predispositions necessary to an im-

proved world public order.

3. The Prescribing Function

(projection of community policy that is both authoritative and controlling)

Recognize the increasing role of international governmental organization in creating and communicating expectations about future decisions.

Weight voting in international governmental organization and special conferences in ways to secure higher conformity with genuine democracy and responsibility.

Establish distinctive specialized institutions, manned by scholars and experts rather than by representatives of governments, for the clarification and recommendation of policies upon important particular problems.

Improve facilities and policies for the making of multilateral agreements for the projection of authoritative general community policy.

Recognize the dominating importance of uniformities in state decision and practice in creating expectations about the requirements of future decision.

Understand the interlocked, cumulative impact of communication from all sources in creating expectations about future decision.

4. The Invoking Function

(provisional characterization of events in terms of community prescriptions)

Aggrieved participants in global community process might be afforded opportunities in appropriate arenas to make timely, non-provocative initiations of the application function to redress putative wrongs.

A specialized invocation competence might be accorded the Secretary-General of the United Nations or established omsbudsmen.

5. The Applying Function

(authoritative characterization of events in terms of community prescription and management of sanctioning measures to secure conformity)[54]

Encourage the resolution of controversies by the parties themselves through diplomacy, mediation, and conciliation.

Maintain panels for third-party adjudication when participants consent. Create specialized, perhaps mobile, panels for particular problems.

Within national constitutive processes, establish unequivocally that

54. The paper in this symposium by Professor Bilder offers examples of alternatives that might be considered for improvement of the application function. Bilder, *International Third Party Dispute Settlement*, 17 DEN. J. INT'L L. & POL'Y 471 (1989).

international law is the law of the land, to be applied by all branches of government; reduce to minimum effect all doctrines of governmental immunity, act of state, political questions, and so on.

Whatever the arena of application, emphasize the importance of procedures for inquiry that both employ a contextual examination of facts in relation to major community goals and principles for the interpretation of prescriptions that emphasize such major goals in all factual contexts.

6. The Terminating Function

(putting an end to prescriptions and arrangements effected under prescriptions)

Establish specialized agencies for reviewing existing prescriptions and arrangements, identifying the obsolete or obsolescent, and recommending measures for ameliorating the destructive costs of necessary change.

7. The Appraising Function

(evaluating decision process in terms of achievement of basic community goals and ascribing responsibility)

Establish specialized agencies, insulated from immediate pressures of threat or inducement, for the continuous appraisal of successes and failures in the management of authoritative decision and for the recommendation of decision process and decisions better designed for the realization of major goals.

A comprehensive inquiry would of course add exploration of the impacts of the protected features of the larger community's various value processes upon the establishment and maintenance of constitutive process.

An appropriate concluding note of restrained optimism may perhaps be that voiced by my late colleague, Harold Lasswell, in closing his book on *The Future of Political Science*:

> It is impossible to contemplate the present status of man without perceiving the cosmic roles that he and other advanced forms of life may eventually play. We are, perhaps, introducing self-awareness into cosmic process. With awareness of self comes deliberate formation and pursuit of value goals. For tens of thousands of years, man was accustomed to living in relatively local environments and to cooperating on a parochial scale. Today we are on the verge of exploring a habitat far less circumscribed than earth. The need for a worldwide system of public order — a comprehensive plan of cooperation — is fearfully urgent. From the interplay of the study and practice of cooperation we may eventually move more wisely, if not more rapidly, toward fulfilling the as-yet-mysterious potentialities of the cosmic process.[55]

55. H. LASSWELL, THE FUTURE OF POLITICAL SCIENCE 242 (1963).

Genocide, State and Self

LOUIS RENÉ BERES*

I

Even in a century that can best be described as the Age of Atrocity, few people have suffered so terribly as the victims of genocide. Enduring all that murders and torments, these victims have been identified by their fellow humans as dark phantoms of subhumanity, suited only for degradation and slaughter. What is more, those who are not directly involved in the killing and dying witness the daily operations of automated extermination with indifference. Not surprisingly, the appalling silence of good people is absolutely vital to those who carry out crimes against humanity.

Why? How has an entire species, miscarried from the start, scandalized its own creation? Are we all the potential murderers of those who live beside us? For as long as we can recall, the corpse has been in fashion. Today, at the close of the twentieth century, whole nations of corpses are the rage. And this is true despite the codification of anti-genocide rules under international law.[1]

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1. *See* Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* December 9, 1948, 78 U.N.T.S. 277 (entered into force January 12, 1951) [hereinafter "Genocide Convention"]. The Genocide Convention was submitted to the Senate by President Harry S. Truman in June, 1949. On February 19, 1986, the Senate consented to ratification with the reservation that legislation be passed that conforms U.S. law to the precise terms of the Treaty. This enabling legislation was approved by Congress in October, 1988, and signed by President Reagan on November 4, 1988. This legislation amends the U.S. Criminal Code to make genocide a Federal offense. It also sets a maximum penalty of life imprisonment when death results from a criminal act defined by the law. This follows the practice of implementing legislation already well-established with respect to crimes of "terrorism." *See also* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 139, ch. XX, 98 Stat. 1837 (1984). This act implements the International Convention Against the Taking of Hostages and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. *See also* Act to Implement the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, and for other purposes, Pub. L. No. 91-449, 84 Stat. 921 (1970); Anti-Hijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (1974); Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. 94-467, 90 Stat. 1997 (1976); Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. 97-351, 96 Stat. 1663 (1982); Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. 92-539, 86 Stat. 1070 (1972); National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255 (1976) (as amended); Federal Income Tax Forgiveness for U.S. Military and Civilian Employees Killed Overseas, Pub. L. 98-259, 98 Stat. 142 (1984); Pub. L. 99-177, 99 Stat. 1037 (1985); Continuing Appropriations, Fiscal Year 1987, Pub. L. 99-591, §§ 301-02, 100 Stat. 3341 (1986). For full texts of these legislative acts, see CONGRESSIONAL RESEARCH SERVICE FOR THE COMMITTEE OF FOREIGN AFFAIRS, 100TH CONG., 1ST SESS., INTERNATIONAL TERRORISM: A COM-

Why? The answer has several levels, several layers of meaning. At one level, the one most familiar to political scientists and legal scholars, the problem lies in the changing embrace of *Realpolitik* in world affairs. Representing a transformation of the traditional political "realism" of Thucydides, Thrasymachus and Machiavelli, this deification of the state has reduced individuals to unfathomable specks of insignificance. In such a world, one wherein the state is the ultimate value, myriad executions are heralded as expressions of the sacred.

To prevent genocide, states must first be shorn of their sacredness. Yet before this can happen, *individuals* must first discover alternative sources of belonging and reassurance. In the final analysis, as this paper will attempt to demonstrate, the underlying problem of genocide, the level of meaning most important to genuine understanding, is not the deification of the state per se, but rather the continuing incapacity of persons to draw meaning *within themselves*. The problem is the universal and sinister power of the *herd* in human affairs; a power now applied by the state, but at any time applicable by other herds.

At its heart, the problem of genocide is one of individuals. Ever fearful of drawing meaning from their own inwardness, human beings draw closer and closer to the herd. Sometimes it is the Class. Sometimes the Tribe. Sometimes the Church. Sometimes the Race. Sometimes the State. Whatever the claims of the moment, the herd spawns hatreds and excesses that make genocide possible. Fostering an incessant refrain of "us" versus "them," it prevents each person from becoming fully human and encourages each person to celebrate the death of "outsiders."

Today the dominant herd, the one that threatens repeated genocides, is the state. The individual in world politics who supports the omnivorous appetites of the state does so out of fear. He does not want to be alone; on the outside. To this end he may find the existence of domestic "parasites" and "foreign enemies" absolutely necessary. Small matter that the victim population, wherever it may exist, is constructed of flesh and blood itself. Since the individual has chosen to renounce personhood at the outset, he is impervious to reason, responding only to the strong emotional advantages of "belonging."

Each of us contains the possibility of becoming fully human. A possibility that would reduce false loyalties to the state and prevent genocide. However, only by nurturing this possibility can we achieve *personhood*. The task is to discover the way back to ourselves. Otherwise, we fly only with the ideals of the herd, with a life of conformance and fear that makes defilement normal. Understood in terms of the contemporary prevention of genocide, this means an obligation to renounce the idolatry of belligerent nationalism in favor of private accomplishment.

Where shall we begin? First, we will consider the attempt by modern

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PILATION OF MAJOR LAWS, TREATIES, AGREEMENTS, AND EXECUTIVE DOCUMENTS, 125-50 (G.P.O. 1987).

international law to control the corrosive effects of *Realpolitik*. Thereafter, we will examine the political requirements of a more dignified and tolerable world order. Finally, we will explore the essential initiatives of individual persons. Initiatives that can be ignored only at the expense of endless and singular infamy.

II

Today there exists a well-established regime for the protection of all human rights.[2] This regime is comprised of peremptory norms, rules that endow all human beings with a basic measure of dignity and that permit no derogation by states. These internationally protected human rights can be grouped into three broad categories:

> — first, the right to be free from governmental violations of the integrity of the person — violations such as torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest or imprisonment; denial of fair public trial; and invasion of the home;
> — second, the right to the fulfillment of vital needs such as food, shelter, health care and education; and
> — third, the right to enjoy civil and political liberties, including freedom of speech, press, religion and assembly; the right to participate in government; the right to travel freely within and outside one's own country; the right to be free from discrimination based on race or sex.[3]

Taken together with other important covenants, treaties and declarations, which together comprise the human rights regime, the Genocide Convention represents the end of the idea of absolute sovereignty concerning non-intervention when human rights are in grievous jeopardy.[4] The Charter of the United Nations, a multilateral, law-making treaty, stipulates in its Preamble and several articles that human rights are protected by international law. In the Preamble, the peoples of the United Nations reaffirm their faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" and their determination "to promote so-

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2. *See Universal Declaration of Human Rights*, G.A. Res. 217A, § III, 3 U.N. GAOR (Resolutions, Pt. 1) at 71, U.N. Doc. A/810 (1948); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966); International Covenant on Economic, and Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 6 I.L.M. 368 (1977).

3. *See* DEPARTMENT OF STATE FOR THE COMMITTEE ON FOREIGN RELATIONS, 97TH CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (G.P.O. 1981).

4. Genocide Convention, *supra* note 1, art. I. The Genocide Convention proscribes conduct that is juristically distinct from other forms of prohibited wartime killing (i.e., killing involving acts constituting crimes of war and crimes against humanity). Although crimes against humanity are linked to wartime actions, the crime of genocide can be committed in peacetime or during a war. According to Article I of the Genocide Convention: "The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

cial progress and better standards of life in larger freedom."

In light of these codified expressions of the international law of human rights, it is abundantly clear that individual states can no longer claim sovereign immunity from responsibility for gross mistreatment of their own citizens.[5] Notwithstanding Article 2 (7) of the U.N. Charter, which reaffirms certain areas of "domestic jurisdiction," each state is now clearly obligated to uphold basic human rights. Even the failure to ratify specific treaties or conventions does not confer immunity from responsibility, since all states are bound by the law of the Charter and by the customs and general principles of law from which such agreements derive.[6]

The international regime on human rights also establishes, beyond any reasonable doubt, the continuing validity of *natural law*[7] as the overriding basis of international law. This establishment flows directly from the judgments at Nuremberg.[8] While the indictments of the Nuremberg

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5. *Report of the Ad Hoc Committee on the International Terrorism*, 28 U.N. GAOR Supp. (No. 28) at 1, U.N. Doc. A/9028 (1973). International law also authorizes individuals within certain states to resort to force as insurgents as a permissible means to secure human rights. Although specially-constituted UN committees and the U.N. General Assembly have repeatedly condemned acts of international terrorism, they exempt those activities that derive from "the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and uphold the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations." *See also Definition of Aggression*, G.A. Res. 3314 (XXIX), 20 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975), 13 I.L.M. 710 (1974); *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, G.A. Res. 2625 (XXV), 25 U.N. GAOR Supp. (no. 28) at 121, U.N. Doc. A/8028 (1970). *See also* Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub. 2/404/Rev. 1 (1981) (this is a comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination).

6. The rationale for this claim is grounded in the understanding (codified at Article 38 of the Statutes of the International Court of Justice) that there are multiple sources of international law and in the associated principle (codified at the Vienna Convention on the Law of Treaties, Article 53) that peremptory or *jus cogens* norms are overriding and permit no derogation. *See* Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (entered into force for the United States, Oct. 24, 1945); *see also* Vienna Convention on the Law of Treaties, U.N. Conference on the Law of Treaties, First and Second Sessions, Mar. 26 - May 24, 1968 and April 9 - May 22, 1969, *opened for signature* May 23, 1969, U.N. Doc. A/CONF./39/27, at 289 (1969), *reprinted in* 8 I.L.M. 679 (1969).

7. The idea of natural law is based upon the acceptance of certain principles of right and justice that prevail because of their own intrinsic merit. Eternal and immutable, they are external to all acts of human will and interpenetrate all human reason. This idea and its attendant tradition of human civility runs almost continuously from Mosaic Law and the ancient Greeks and Romans to the present day.

8. *See* INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON 1945 (report of Robert H. Jackson, United States Representative to the Conference, 1949). The judgment of the International Military Tribunal of October 1, 1946 rested upon the four Allied Powers' London Agreement of August 8, 1945, to which was annexed a Charter establishing the Tribunal. Nineteen other states subsequently acceded to the Agreement. *See also* 15 UNITED

Tribunal were cast in terms of existing positive law (i.e., law enacted by states), the actual decisions of the Tribunal unambiguously reject the proposition that the validity of international law depends upon its "positiveness" (i.e., its explicit and detailed codification). The words used by the Tribunal ("So far from it being unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished") derive from the principle: *nullum crimen sine poena* (no crime without a punishment). This principle, of course, is a flat contradiction of the central idea that underlies "positive jurisprudence" or law as command of a sovereign.[9]

From the point of view of the United States, the Nuremberg obligations are, in a sense, doubly binding. This is the case because these obligations represent not only current normative obligations of international law, but also the higher law obligations engendered by the American political tradition.[10] By its codification of the principle that fundamental

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NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 155-88, for an analysis of defense pleas of "superior orders" in various war crimes trials. For German war crimes trials after the First World War, including the case of *Dithmar and Boldt (Llandovery Castle Case)*, see 16 AM. J. INT'L L. 674, 708 (1922).

9. The central idea of legal positivism is that true law is not a set of norms existing naturally and awaiting discovery, but rather those norms by which states have explicitly consented to be bound. In international law, those norms are codified in treaties or fall within the bounds of sources identified in the Statute of the International Court of Justice, *supra* note 6, at art. 38.

10. Since justice, according to the Founding Fathers, must bind all human society, the rights articulated by the Declaration of Independence cannot be reserved only to Americans. To deny these rights to others would be illogical and self-contradictory, since it would undermine the permanent and universal law of nature from which the Declaration derives. This understanding was represented by Thomas Paine, who affirmed:

> The Independence of America, considered merely as a separation from England, would have been a matter of but little importance, had it not been accompanied by a Revolution in the principles and practices of Governments. She made a stand, not for herself only, but for the world, and looked beyond the advantages herself could receive.

T. PAINE, THE RIGHTS OF MAN, 151 (Everyman ed. 1915).

Where it is understood as resistance to despotism, insurgency has also been defended as permissible in the Bible and in the writings of ancient and medieval classics. Such defense, for example, can be found in Aristotle's *Politics*, Plutarch's *Lives* and Cicero's *De Officiis*. Indeed, in view of the long-standing support for various forms of insurgency in multiple sources of positive and natural law, it is reasonable to argue that a peremptory norm of general international law (a *jus cogens* norm) has emerged on this matter. According to Article 53 of the Vienna Convention on the Law of Treaties, "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/CONF. 39/27 (1969), 63 AM. J. INT'L L. 875 (1969). Even a treaty that might seek to criminalize forms of insurgency protected by this peremptory norm would be invalid. According to Article 53 of the Vienna Convention, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." *Id.* The concept is extended to newly emerging peremptory norms by Article 64 of the Convention: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* at art. 64.

human rights are not an internal question for each state, but an imperious postulate of the international community, the Nuremberg obligations represent a point of perfect convergence between the law of nations and the jurisprudential/ethical foundations of the American republic.

In a very real sense, worldwide unconcern for legal protection of human rights (including, ultimately, genocide) grew out of the post-Westphalian system of world politics — a system that sanctified untrammeled competition between sovereign states and that identified national loyalty as the overriding human obligation. With these developments, unfettered nationalism and state-centrism became the dominant characteristics of international relations and the resultant world order came to subordinate all moral and ethical sensibilities to the idea of unlimited sovereignty. Such subordination was more than a little ironic, since even Jean Bodin, who advanced the idea of sovereignty as one free of any external control or internal division, recognized the limits imposed by divine law and natural law.

III

There now exists a regime of binding international agreements that places worldwide human welfare above the particularistic interests of individual states or elites, but what can this regime be expected to accomplish? Granted, there are now explicit and codified rules of international law that pertain to genocide, but what can be done about their effective enforcement? Indeed, doesn't a consideration of post-World War II history reveal many instances of genocide and genocide-like crimes?[11] Where

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11. There has been no interruption of genocide. Greedy for executions, several states continue to slay segments of their own populations without fear of foreign interference. This can happen because those states that are not directly involved are driven, above all else, by the imperatives of geopolitics. Eager to preserve alignments that allegedly improve national influence, these "innocent" states inevitably subordinate considerations of individual dignity to the presumed requirements of power.

Left unchecked, the legacy of this corrosive calculus can only be an endless reservoir of sub-humanity, extraneous to every purpose save loathing and ritual slaughter. In Cambodia, over one million people were murdered by Pol Pot and the Khmer Rouge during the period 1975-79. In Paraguay, the Ache Indians, a peaceful and primitive tribe that has lived for centuries in the jungles of South America, have been meticulously exterminated by the Stroessner government and its Nazi war criminal advisors. In Tibet, the forces of the Peoples Republic of China have engaged in killing that threatens the extinction of the Tibetans as a national and religious group. In South Africa, the sustained barbarism of the white minority *apartheid* regime against the majority black population constitutes an arguable case of genocide.

Although the Pretoria regime does not seek annihilation of the black majority, several of its particular crimes against this population are proscribed by Article II of the U.N. Convention on the Prevention and Punishment of the Crime of Genocide. By its forcible transfer of more than three million blacks to desolate "homelands", the *apartheid* system hopes to institutionalize nothing less than cost-effective slavery. Furthermore, by its failure to oppose "separate development" with more than "constructive engagement," the Reagan administration countenanced not merely violations of civil rights, but crimes against humanity.

was international law?

To answer these questions, one must first recall that international law is a distinctive and unique system of law. This is the case because it is decentralized rather than centralized; because it exists within a social setting (i.e., the world political system) that lacks government. It follows that in the absence of central authoritative institutions for the making, interpretation and enforcement of law, these juridical processes evolve upon *individual states*. It is, then, the responsibility of individual states, acting alone or in collaboration with other states, to make international law "work" with respect to genocide and genocide-like crimes.

How can this be done? In terms of the law of the Charter, it is essential that states continue to reject the Article 2 (7)[12] claim to "domestic jurisdiction" whenever gross outrages against human rights are involved. Of course, the tension between the doctrines of "domestic jurisdiction" and "international concern" is typically determined by judgments of national self-interest, but it would surely be in the long-term interest of all states to oppose forcefully all crimes against humanity. As Vattel observed correctly in the Preface to his *The Law of Nations* in 1758:

> But we know too well from sad experience how little regard those who are at the head of affairs pay to rights when they conflict with some plan by which they hope to profit. They adopt a line of policy which is often false, because often unjust; and the majority of them think that they have done enough in having mastered that. Nevertheless it can be said of states, what has long been recognized as true of individuals, that the *wisest* and the *safest* policy is one that is founded upon justice.[13]

With this observation, Vattel echoes Cicero's contention that "No one who has not strictest regard for justice can administer public affairs to advantage." But how are we to move from assessment to action, from prescription to policy? Where, exactly, is the normative juncture between the theory of human rights as pragmatic practice and the operationalization of that theory?

Under the terms of Article 56 of the Charter, member states are urged to "take joint and separate action in cooperation with the organization" to promote human rights. Reinforced by an abundant body of ancillary prescriptions, this obligation stipulates that the legal community of humankind must allow, indeed *require*, "humanitarian intervention" by

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12. According to Article 2(7) of the Charter,

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7.

13. E. DE VATTEL, THE LAW OF NATIONS 12a (C.G. Fenwick trans., 1st ed. 1916) (emphasis added).

individual states in certain circumstances. Of course, such intervention must not be used as a pretext for aggression and it must conform to settled legal norms governing the use of force, especially the principles of *discrimination, military necessity* and *proportionality.*[14] Understood in terms of the long-standing distinction between *jus ad bellum* and *jus in bello,* this means that even where the "justness" of humanitarian intervention is clearly established, the means used in that intervention must not be unlimited. The lawfulness of a cause does not in itself legitimize the use of certain forms of violence.

As for the legality of humanitarian intervention, it has been well-established for a long time. Although it has been strongly reinforced by the post-Nuremberg human rights regime, we may find support for the doctrine in Grotius' seventeenth-century classic, *The Law of War and Peace.*[15] Here, the idea is advanced and defended that states may interfere within the territorial sphere of validity of other states to protect innocent persons from their own rulers, an idea nurtured and sustained by the natural law origins of international law.

While the theory of international law still oscillates between an individualist conception of the state and a universalist conception of humanity, the post World War II regime of treaties, conventions and declarations concerning human rights is necessarily founded upon a broad doctrine of humanitarian intervention. Indeed, it is the very purpose of this regime to legitimize an "allocation of competencies" that favors the natural rights of humankind over any particularistic interests of state. Since violations of essential human rights are now undeniably within the ambit of global responsibility, the subjectivism of state primacy has been unambiguously subordinated to the enduring primacy of international justice. In place of the Hegelian concept of the state as an autonomous, irreducible center of authority (because it is an ideal that is the perfect manifestation of Mind), there is now in force a greatly expanded version of the idea of "international concern."[16]

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14. The idea of *proportionality* is contained in the Mosaic *Lex Talionis,* since it prescribes that an injury should be requited reciprocally, but certainly not with a greater injury. As Aristotle understood the *Lex Talionis,* it was a law of justice, not of hatred — one eye, not two, for an eye; one tooth, no more, for a tooth.

15. The idea expressed at Article 38(1)(d) of the Statute of the International Court of Justice, *supra* note 6, that scholarly writings (of which Grotius' classic is an instance) are a proper source of international law may have its roots in the following Jewish tradition — that a fellowship of scholars is entrusted with legal interpretations. This idea diverges from the Jewish tradition in that Jewish scholars, rather than being actual sources of legal norms, were always bound by the Talmudic imperative, "Whatever a competent scholar will yet derive from the Law, that was already given to Moses on Mount Sinai." (JERUSALEM MEGILLAH IV) Yet, even this divergence may not be as far-reaching as first supposed, since one view of the norm-making character of scholarly writings on international law is that these writings are never more than exegeses of overriding natural law and that their contributions to the development of international law are always contingent upon being in harmony with reason or "true law."

16. U.N. CHARTER, art. 2, para. 7. In contrast to the principle of "domestic jurisdiction"

Within the current system of international law, therefore, external decision-makers are authorized to intercede in certain matters that might at one time have been regarded as internal to a particular state. While, at certain times in the past, even gross violations of human rights were defended by appeal to "domestic jurisdiction," today's demands for exclusive competence must be grounded in far more than an interest in avoiding "intervention." This trend in authoritative decision-making toward an expansion of the doctrine of "international concern" has been clarified by Lauterpacht's definition of intervention:

> Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand — for positive conduct or abstention — a demand which, if not complied with, involves a threat of or recourse to compulsion, though not necessarily physical compulsion, in some form.[17]

We can see, therefore, that intervention is not always impermissible, and that — indeed — any assessment of its lawfulness must always be contingent upon *intent*. Applying Lauterpacht's standard, it follows that where there is no interest in exerting "dictatorial interference," but simply an overriding commitment to the protection of human rights, the act of intervening may represent the proper enforcement of pertinent legal norms. This concept of intervention greatly transforms the exaggerated emphasis on "domestic jurisdiction" that has been associated improperly with individual national interpretations of Article 2 (7) of the Charter and, earlier, with Article 15 (8) of the Covenant of the League of Nations.[18] By offering a major distinction between the idea of self-serving

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(codified in the preceding articles), which recognizes a reserved domain within which a state can act at its own discretion, "international concern" recognizes limits on this domain compelled by matters of absolutely overriding importance. These matters pertain to a variety of peremptory norms of international law, especially those involving restraint in the use of armed force and respect for guaranteed minimum standards of human rights. For example, notwithstanding the traditionally expressed prerogatives of sovereignty, a state no longer has the right to claim itself the sole judge in matters involving repression and/or torture of individuals within its jurisdiction or the use of armed force against a neighboring state. These are matters of "international concern."

17. *See* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 167 (1950).

18. An example of abusing the domestic jurisdiction principle of the Charter can be found in certain state reactions to Chinese genocide against Tibet in the 1950s. During this period, according to a report issued by the International Commission of Jurists (The Question of Tibet and the Rule of Law) in 1959, the Chinese killed tens of thousands of Tibetans; deported thousands of Tibetan children; killed Buddhist monks and lamas on a very large scale; and subjected religious leaders and public officials to forced labor, arbitrary arrest and torture. The evidence pointed to "a systematic design to eradicate the separate national, cultural and religious life of Tibet." These facts notwithstanding, the East European socialist states (with the exception of Yugoslavia) acted as a solid bloc in defense of China, arguing that Tibet was an integral part of the People's Republic and that consideration of the question of Tibet by the U.N. General Assembly constituted an intervention in China's domestic affairs. For more on this matter, see L. KUPER, THE PREVENTION OF GENO-

interference by one state in the internal affairs of another state and the notion of the general global community's inclusive application of law to the protection of human dignity, it significantly advances the goal of a just world order. Although this test is hardly free of ambiguity, it does clarify that the choice between "international concern" and "domestic jurisdiction" is not grounded in unalterable conditions of fact, but rather in constantly changing circumstances that permit a continuing adjustment of competencies. It follows that whenever particular events create significant violations of human rights, the general global community is entitled to internationalize jurisdiction and to authorize appropriate forms of decision and action.

Ironically, the United Nations, which is responsible for most of the post-Nuremberg codification of the international law of human rights, has sometimes been associated with increased limits on the doctrine of humanitarian intervention. These limits, of course, flow from the greatly reduced justification for the use of force in the Charter system of international law, especially the broad prohibition contained in Article 2 (4).[19] Yet, while it cannot be denied that humanitarian intervention might be used as a pretext for naked aggression, it is also incontestable that a too-literal interpretation of 2 (4) would summarily destroy the entire corpus of normative protection for human rights — a corpus that is coequal with "peace" as the central objective of the Charter. Moreover, in view of the important nexus between peace and human rights, a nexus in which the former is very much dependent upon widespread respect for human dignity, a too-literal interpretation of 2 (4) might well impair the prospects for long-term security.

It must be widely understood that the Charter does not prohibit all uses of force and that certain uses are clearly permissible in pursuit of basic human rights. Notwithstanding its attempt to bring greater centralization to legal processes in world politics, the Charter system has not impaired the long-standing right of individual states to act on behalf of the international legal order. In the continuing absence of effective central authoritative processes for decision and enforcement, the legal community of humankind must continue to allow, indeed, must continue to *require*, humanitarian intervention by individual states.

As we have seen, humanitarian intervention is one way of giving effect to the enforcement of anti-genocide norms in international law. Another way involves the use of courts, domestic and international. Under Article V of the Genocide Convention, signatory states are required to enact "the necessary legislation to give effect to" the Convention. Article VI of the Convention further provides that trials for its violation be con-

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CIDE 158-159 (1985).

19. According to Article 2(4), "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." U.N. CHARTER, *supra* note 12, at art. 2, para. 4.

ducted "by a competent tribunal of the state in the territory of which the act was committed, or by any such international penal tribunal as may have jurisdiction."

Here, of course, there are some special problems. First, the International Court of Justice at the Hague has no penal or criminal jurisdiction. It does, however, have jurisdiction over disputes concerning the interpretation and application of a number of specialized human rights conventions.[20] In exercising its jurisdiction, however, the ICJ must still confront significant difficulties in bringing recalcitrant states into contentious proceedings. There is still no way to effectively ensure the attendance of defendant states before the Court. Although many states have acceded to the Optional Clause of the Statute of the ICJ (Article 36, Paragraph 2), these accessions are watered down by many attached reservations and by geopolitical concerns of the moment.

Second, courts of the states where acts in violation of the Genocide Convention have been committed are hardly likely to conduct proceedings against their own national officials (excluding, or course, the possibility of courts established following a coup d'etat or revolution). What is needed, therefore, is an expansion and refinement of the practice of states after World War II, a practice by states that had been occupied during the war, of seeking extradition of criminals and of trying them in their own national courts.[21]

In the future, there need be no war or occupation to justify the use of domestic courts to punish crimes of genocide. There is nothing novel about such a suggestion since a principal purpose of the Genocide Convention lies in its explicit applicability to non-wartime actions. Limits upon actions against enemy nationals are as old as the laws of war or international law. But the laws of war do not cover a government's actions against its own nationals. It is, therefore, primarily in the area of domestic atrocities that the Genocide Convention seeks to expand preexisting international penal law.

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20. Genocide Convention, *supra* note 1, at art. 9; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Dec. 6, 1967, art. 10, 18 U.T.S. 3201, T.I.A.S. No. 6418; Convention on the Political Rights of Women, Mar. 31, 1953, art. 9, 193 U.N.T.S. 135; Convention Relating to the Status of Refugees, Jul. 28, 1951, art. 38, 189 U.N.T.S. 150.

21. Apart from the prosecution of war criminals, there have been only two trials under the Genocide Convention by competent tribunals of the states wherein the crimes were committed: (1) in Equatorial Guinea, the tyrant Macis had been slaughtering his subjects and pillaging his country for a number of years. He was ultimately overthrown, found guilty of a number of crimes, including genocide, and executed. (In a report on the trial, however, the legal officer of the International Commission of Jurists concluded that Macis had been wrongfully convicted of genocide); and (2) in Kampuchea, when the Khmer Rouge were overthrown by the Vietnamese, the successor government instituted criminal proceedings against the former Prime Minister, Pol Pot, and the deputy prime minister on charges of genocide. The accused were found guilty of the crime *in absentia* by a people's revolutionary tribunal. Pol Pot, of course, is still free. For more on these cases, see L. KUPER, THE PREVENTION OF GENOCIDE (1985).

Going beyond Article VI of the Genocide Convention, which holds to the theory of "concurrent jurisdiction" (jurisdiction based on the site of the alleged offense and on the nationality of the offender), *any* state may now claim jurisdiction when the crime involved is a species of genocide.[22] There is already ample precedent for such a rule in international law, a precedent based upon the long-standing treatment of common enemies of mankind (*hostes humani generis*) or international outlaws as within the scope of universal jurisdiction.[23]

In terms of the broad issue of using domestic courts to uphold inter-

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22. Genocide Convention, *supra* note 1, at art. 1. In addition to the territorial principle and the nationality principle, there are three other traditionally recognized bases of jurisdiction under international law: the protective principle, determining jurisdiction by reference to the national interest injured by the offense; the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and the passive personality principle, determining jurisdiction by reference to the nationality of the person injured by the offense. The Genocide Convention itself, however, does not stipulate universal jurisdiction. *See also* Demjanjuk v. Petrovisky, 776 F.2d 571, 582-83 (6th cir. 1985), *reprinted in*, INTERNATIONAL CRIMINAL LAW: CRIMES 286 (Bassiouni ed. 1986). In this recent case supporting the principle of universal jurisdiction in matters concerning genocide, a U.S. Court of Appeals ruled for the extradition to Israel of accused Nazi war criminal John Demjanjuk even though the crimes charged were committed against persons who were not citizens of Israel and the state of Israel did not exist at the time the heinous crimes were committed. In the words of the court: "When proceeding on that jurisdictional premise neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of the nations or against humanity, and that the prosecuting nation is acting for all nations." *See also* Blumenthal, *Nazi Whitewash in 1940's Charged*, N.Y. Times, Mar. 11, 1985, at A5, col. 1. Recent U.S. alacrity in extraditing Nazi war criminals to other countries for prosecution belies America's protection of such criminals for geopolitical purposes. Substantial evidence now indicates that U.S. intelligence officials concealed the Nazi records of hundreds of former enemy scientists to bring them into this country after World War II. The documents disclosed reveal that many American authorities knew that the entering criminals were "ardent Nazis" implicated in atrocities. Specifically, between 1945 and 1955, some 800 former enemy rocket experts and other specialists were brought into the U.S. under an American intelligence program first called "Overcast," then "Project Paperclip."

23. *See* INTERNATIONAL CRIMINAL LAW, *supra* note 21, at 284-285. The principle of universality is founded upon the presumption of solidarity between states in the fight against crimes. *See also* II GROTIUS, DE JURE BELLI AC PACIS, ch. 20 (1913); I VATTEL, LE DROIT DES GENS, ch. 19 (1916). *See also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.T.S. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.T.S. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.T.S. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.T.S. 3516, T.I.A.S. No. 3365. The case for universal jurisdiction (which is strengthened wherever extradition is difficult or impossible to obtain) is also built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the high contracting parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. *See generally* I BASSIOUNI, INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE, ch. 6 (1982); RESTATEMENT OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 402-04, 443 (Tentative Draft No. 5, 1961).

national law, the example of the United States may be of particular interest.[24] Since its founding, the United States has reserved the right to enforce international law within its own courts. Article I, Section 8, Clause 10 of the American Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute.[25] This statute authorizes United States Federal Courts to hear those civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. At that time, of course, the particular target of this legislation was piracy on the high seas.

Over the years, United States federal courts have rarely invoked the "law of nations," and then only in such cases where the acts in question had already been proscribed by treaties or conventions. In 1979, a case seeking damages for foreign acts of torture was filed in the federal courts. In a complaint filed jointly with his daughter, Dolly, Dr. Joel Filartiga, a well-known Paraguayan physician and artist and an opponent of President Alfredo Stroessner's repressive regime, alleged that members of that regime's police force had tortured and murdered his son, Joelito. On June 30, 1980, the Court of Appeals for the Second Circuit found that since an international consensus condemning torture had crystallized, torture violates the "law of nations" for purposes of the Alien Tort Statute. Therefore, United States courts have jurisdiction under the statute to hear civil suits by the victims of foreign torture, if the alleged international outlaws are found in the United States.[26] With this in mind, it would be enormously useful — in reference to the control of genocide and genocide-like crimes — if the United States were to expand its commitment to identify

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24. Another case is that of Israel. Recognizing that genociders are common enemies of mankind and that no authoritative central institutions exist to apprehend such outlaws or to judge them as a penal tribunal, Israel sought to uphold the anti-genocide norms of international law in its trial of Adolf Eichmann, a Nazi functionary of German or Austrian nationality. Indicted under Israel's Nazi Collaborators Punishment Law, Eichmann was convicted and executed after the judgment was confirmed by the Supreme Court of Israel on appeal in 1962. Attorney General of Israel v. Eichmann, 36 I.L.R. 5 (Israel Dist. Ct. Jerusalem 1961), *aff'd* 36 I.L.R. 277 (Israel Supreme Court 1962).

25. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (1982) (originally enacted as part of the first Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 76-77).

26. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). There is an ironic dichotomy in U.S. law here. In *Filartiga v. Pena-Irala*, the Second Circuit held that 28 U.S.C. § 1350 (The Alien Tort Claims Act) provides a basis for aliens to bring actions in U.S. federal courts for torts committed in violation of the law of nations. Yet, a district court's holding in another recent case, Handel v. Artukovic, 601 F.Supp. 1421 (C.D. Cal. 1985), means that U.S. citizens lack the private right to sue for violations of the law of nations. Thus, U.S. federal courts appear to have jurisdiction to hear the claims of aliens more readily than they do the claims of U.S. citizens. In *Handel v. Artukovic*, plaintiffs, U.S. citizens, brought a class action seeking compensatory and punitive damages against defendant for his alleged involvement in the deprivations of life and property suffered by Jews in occupied Yugoslavia during World War II.

and punish such transgressions within its own court structure and if other states were prepared to take parallel judicial measures.[27]

IV

We all know, however, that the presumed requirements of *Realpolitik* invariably take precedence over those of international law. It follows that before the progressive codification of anti-genocide norms can be paralleled by the widespread refinement and expansion of pertinent enforcement measures, individual states must come to believe that international legal steps to prevent and punish genocide and genocide-like crimes are always in their own best interests.[28] Drawing upon the Thomistic idea of law as a positive force for directing humankind to its proper goals (an idea that is itself derived from Aristotle's conception of the natural development of the state from social impulses), we need to seek ways of aligning the anti-genocide dictates of the law of nations with effective strategies of implementation — i.e., strategies based on expanded patterns of humanitarian intervention, transnational judicial settlement, and domestic court involvement.

To accomplish this objective, primary attention must be directed to-

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27. For more on the role of domestic courts in the interpretation and enforcement of international law, see Kratochwil, *The Role of Domestic Courts as Agencies of the International Legal Order*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 236-63 (1985).

28. And this, in turn, requires that individuals within states use their own domestic courts for supporting the anti-genocide norms of international law. In this connection, U.S. citizens can participate in nonviolent protests of current foreign policies and can defend such permissible acts of civil resistance in U.S. courts on the basis of international law. International law is already a part of U.S. domestic law. According to Article VI of the U.S. Constitution: "All treaties made. . .under the authority of the United States shall be the supreme law of the land. . . ." It follows that even those who would deny the binding quality of general international law on U.S. foreign policy must acknowledge the specific obligations that have been incorporated into domestic law. These obligations flow not only from Article VI (the so-called Supremacy Clause) but also from the U.S. Supreme Court's decision in The Paquete Habana, 189 U.S. 453 (1900), which brought customary international law into U.S. domestic law. Further, in United States v. Belmont, 301 U.S. 324 (1937) and United States v. Pink, 315 U.S. 203 (1942), the U.S. Supreme Court held that other types of international agreements concluded by the U.S. Government that have not received the formal advice and consent of the Senate are nonetheless protected by the Supremacy Clause. Two criminal cases that have recently produced a major breakthrough in U.S. courts are People v. Jarka, No. 002170, slip op. (Cir. Ct. Lake County, Ill. 1985) and Chicago v. Streeter, No. 85-108644, slip op. (Cir. Ct. Cook County, Ill. 1985). Here the defendants were acquitted by invoking the traditional common law defense known as "necessity." This defense, which erases criminal liability for conduct that would otherwise be an offense (if the accused was without blame in creating the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than that which might reasonably result from his/her own conduct) has broad applicability concerning genocide and genocide-like crimes. Because of the *Jarka* and *Streeter* acquittals, attorneys representing individuals who engage in acts of nonviolent civil resistance against elements of U.S. foreign policy may invoke these cases as appropriate precedents for defense. For an up-to-date and authoritative study of guidelines for defending civil resistance protesters under principles of international law, see F. A. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW (1987).

ward harmonizing these strategies with the self-interested behavior of states. Here, it must be understood that the existence of even a far-reaching human rights regime is not enough. Before this regime can make productive claims on the community of states, the members of this community will need to calculate that such compliance is in their respective interests. As David Hume once noted, it is the "common sense of interest" that "mutually expressed and . . . known to both . . . produces a suitable resolution and behavior."[29] Ultimately, this sort of calculation will depend, in turn, on the creation of a new world order system — a planetary network of obligations stressing cooperative global concerns over adversary relationships. The centerpiece of this new world order system must be the understanding that all states and all peoples form one essential body and one true community.

Before the realism of anti-genocide ideals can prevail in global society, the major states in that society must learn to escape from the confines of a Darwinian context for choosing policy options — a context wherein major world powers view virtually all of their options within the limited parameters of bipolar competition and antagonism. Under the aegis of present perspectives, these states have been willing to abide virtually any evil amongst their allies in the overriding commitment to geopolitical advantage. Vitalized by their misconceived intuitions of *Realpolitik*, the leaders of the major world powers have abandoned their states to the instant, to induced cathartic crises that carry them away from their ideals and their interests at the same time.

To eliminate these crises will not be easy. Indeed, the only real hope for effective legal remedies concerning genocide lies in the replacement of Darwinism with globalist thinking in world affairs. Such remedies cannot be implemented where states feel themselves imprisoned by a recalcitrant struggle for existence. The presumption of the *bellum omnes contra omnes* in international society must first be renounced.

The task, then, is to make the separate states conscious of their imperative planetary identity. To succeed in this task will be very difficult. But it need not be as fanciful as *Realpolitikers* would have us believe. Before we assume that genocide is a permanent fixture of international relations, we must understand that politics can change. And since law follows politics, the transformation of lethal forms of competition into new archetypes for global society can give new and effective meaning to anti-genocide norms.

The initiative must be taken by the superpowers. Before international law can prevent genocide and genocide-like crimes, the United States and the Soviet Union will have to end their all-consuming and protracted enmity. As long as the present condition of bipolar antagonism endures, each superpower will continue to accept the doctrine that might makes right.

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29. *See* D. HUME, A TREATISE OF HUMAN NATURE (H. Aiken, ed., 1948).

Driven by their intense rivalry, these states will overlook the anti-genocide obligations of international law. Eager to preserve alignments that allegedly improve national influence, the United States and the Soviet Union — as long as they defer to the primacy of the Cold War — will subordinate considerations of human life and individual dignity to the presumed requirements of power. In a manner reminiscent of the Holocaust, which was permitted to happen only because Nazi intent fused with Allied "priorities," today's genocides can take place because *good* states have more pressing concerns.[30]

Consider America. The problem comes back to individuals. Before America can liberate itself from the confines of endless competition with a despised adversary, Americans themselves will have to change. Before the United States can begin to "care" about genocide in other lands, Americans will have to re-make a society that remains consecrated to what Hannah Arendt called "thoughtlessness."

There are other features of contemporary American society that make genocide possible elsewhere. We Americans suffer not only from a widespread unwillingness to think. We also display a far-reaching incapacity to *feel*.[31] We are largely creatures of "unfeeling." The passive, af-

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30. An example is the U.S. failure to act decisively against *apartheid*. Significantly, *apartheid* is linked with genocide in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, and several efforts have been undertaken to make the practice of *apartheid* punishable under the terms of the Genocide Convention. Moreover, in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, November 11, 1970, 754 U.N.T.S. 73, "inhuman acts resulting from the policy of *apartheid*" are qualified as "crimes against humanity." And in various U.N. documents, *apartheid* is associated with both genocide and crimes against humanity. *See, e.g.*, General Assembly Resolutions 2545, XXIV, December 11, 1969; and 2438, XXIII, December 19, 1968. *See also* International Convention on the Suppression and Punishment of the Crime of *Apartheid*, *entered into force*, July 18, 1976, G.A. Res. 3068, 28 U.N. G.A.O.R., Supp. (No 30), U.N. Doc A/9030 (1974); International Convention of the Elimination of All Forms of Racial Discrimination, *entered into force*, Jan. 4, 1969, G.A. Res. 2160A, 20 U.N. G.A.O.R., Supp. (No. 14) U.N. Doc. A/6014 (1966).

31. Indeed, our very definitions of pathological behavior omit the most terrible crimes of unfeeling, including genocide. Using the extant definitions accepted in psychology and psychiatry, it is not necessarily pathological behavior to take part in mass murder or genocide. Thus, Eichmann and other major Nazi functionaries in the Holocaust were repeatedly described as "completely sane." What this suggests, *inter alia*, is the triumph of the absurd, a world in which mass killers may be "normal" but where legions of harmless people who suffer mild neuroses and anxieties are characterized as "emotionally disturbed" or "mentally ill." For an exploration of this situation, which reveals just how far-reaching the absence of responsibility to others has become in contemporary life, see Charny, *Genocide and Mass Destruction: Doing Harm to Others as a Missing Dimension in Psychopathology*, 49 PSYCHIATRY: INTERPERSONAL AND BIOLOGICAL PROCESSES 144, No. 2. (1986). Significantly, the perfectly "sane" genociders have often been able to transfer responsibility to others, and even to rationalize the transference in terms of legal and ethical obligations. In response to questioning at his trial in Jerusalem, Eichmann always maintained that he had not only obeyed orders (at times identifying blind obedience as the "obedience of corpses," or *Kadavergehorsam*), but he had also obeyed the *law*. Moreover, he insisted that he had lived his entire life according to the moral precepts of the philosopher Kant. In Kant's philoso-

fectless anti-hero we encounter in fiction is a mirror-image of a real social situation, a creature of routine who is not deliberately self-destructive, just "prudent"; not intentionally cruel, just "dissociated."

Although it is true that we enjoy, as Americans, a high degree of conventional political freedoms, it is also true that we are (in an even larger sense) captives. Bought off by the promises of participation and production, we have exchanged our capacity to act as individuals for the "security" of centrally directed automata. Enveloped by the comforting fog of "representative government," we have become unwilling to question.

The danger was already foreseen by Tocqueville, who understood that democracy can produce its own forms of tyranny. Tocqueville envisioned a benignly operating polity that "hinders, restrains, enervates, stifles and stultifies" by imposing "a network of petty complicated rules." Encouraging the citizen to pursue "petty and banal pleasures," and "to exist in and for himself," democratic "equality" has set the stage for isolation and passivity.

Much of our freedom is an illusion. Indeed, we contribute to our unfreedom as individuals because we don't recognize the extent of our captivity. As Rousseau writes in *Emile*: "There is no subjugation so perfect as that which keeps the appearance of freedom, for in that way one captures volition itself."

This brings us to the core of the problem. Bereft of volition, we are almost reflexively obedient, ever-ready to defer. Captivated by the delusion of potency and autonomy, we have surrendered to impotence and passionless automatism. Overwhelmed by a burlesque chorus of national cheerleaders, we seek shelter in the herd.

The ironies abound. Our capitulation to an all-consuming anti-Sovietism has been made possible by the guarantees of a democratic society. At the same time, these guarantees need not be the source of our debility as a people and as a nation. Taken as a starting point for a challenge to current foreign policies — a point for which they were originally intended — they could contribute to our personal and collective liberation and thus to our intolerance of genocide.

But a renewed awareness of political freedom is not enough. We must first understand that the "rewards" of compliance are unsatisfactory; that they are erected upon the deception that self-worth flows freely from personal wealth and unceasing consumption. Such an understanding is already underway, animated by wave after wave of dissatisfaction with the trappings of "success."

There is no shortage of documentation of this phenomenon. The sociologists have constructed entire libraries of doctoral theses on the topic. But a more engaging comment has been offered by the novelist Walker Percy. In a literary career that spans his publication of the novel *The*

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phy, the source of law was practical reason; for Eichmann it was the will of the *Fuhrer*.

Moviegoer in 1961 through the publication of his second work of nonfiction, *Lost in the Cosmos: The Last Self-Help Book* in 1983, Percy's chief concern has been with "the dislocation of man in the modern age." Struck by the sense of ennui and meaninglessness that shadows lives nestled by affluence, Percy tells one interviewer:

> The thing that fascinates me is the fact that men can be well-off, judging by their own criteria, with all their needs satisfied, goals achieved, et cetera, yet as time goes on, life is almost unbearable. Amazing!

But it is not really "amazing." In the late twentieth century world of America, metaphysic is replaced by myth. Deprived of anything remotely resembling an authentic creed, Americans seek solace in silence. Yet, in trading off their freedom to disobey for an expanding array of consumer goods, they inevitably discover unhappiness. It is not that they recognize the *ideé fixe* of anti-Sovietism as a lie (because they have never really been interested in foreign affairs as such) but that their reward for "going along" is not what it was cut out to be.

The connections between an overriding interest in commercial profit and the practice of genocide is already a matter of historical record.[32] Consider the following bids returned, in Nazi Germany, for the construction of gas chambers:

> 1. A. Tops and Sons, Erfurt, manufacturers of heating equipment: "We acknowledge receipt of your order for five triple furnaces, including two electric elevators for raising the corpses and one emergency elevator . . . ."
> 2. Vidier Works, Berlin: "For putting the bodies into the furnace, we suggest simply a metal fork moving on cylinders . . . ."
> 3. C.H. Kori: "We guarantee the effectiveness of the cremation ovens, as well as their durability, the use of the best material and our faultless workmanship."[33]

Despite the balloons and bravado of "a new patriotism," the spectacle of America today is one of nihilism. Not daring to look our crimes in the face, we have surrendered to an unprecedented form of gluttony, an insatiable craving for more and more that produces nothing in the way of satisfaction. Desperate to demonstrate our principles and our power, we succeed only in buttressing injustice and in abdicating our influence. Be-

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32. These connections, in turn, are reinforced by the deliberate bewitchment of language. In the lexicon of the Third Reich, such words as "extermination," "liquidation" and "killing" rarely surfaced. Rather, the goal was "final solution" (*Endlosung*), and the prescribed methods involved "evacuation" (*Aussiedlung*); "special treatment" (*Sonderbehandlung*) and "resettlement" (*Umsiedlung*). Indeed, all communications regarding "final solution" were subject to a strict "language rule" (*Sprachregelung*) which was itself a perversion of language.

33. Shapiro, "A Search for Conscience," *Philadelphia Jewish Exponent*, March 29, 1968, *noted in* CHARNY, HOW CAN WE COMMIT THE UNTHINKABLE? GENOCIDE: THE HUMAN CANCER 185 (1982).

reft of an authentic vital energy, we have turned from the possibilities of wisdom and genuine understanding to a desolate panorama of superstition and unconcern.

For most Americans, the invitum of the present lies not in the vacant intuitions of their leaders (for this has always been manifest for anyone who cares to notice) but in the disappointing exchange of "things" for silence. In an era where there can be no meaningful differentiation between the boardrooms of our major corporations and the backrooms of organized crime, it is not that we expect honesty, but that we feel cheated by the bargain we have struck. Sickened when we hear our leaders brandish cosmic principles of "freedom" and "democracy" with evangelical fervor, it is not because we have ever taken such mendacities of language seriously, but because there has been no felt compensation for our dishonor.

The barbarians are not all outside the gates. They are also within. They are ourselves. We remain ready to coexist with genocide unless we learn to rebel.[34] This rebellion, however, must not be directed against our political order directly (the ordinary meaning of rebellion), but against the underlying oppression of a stultifying society.

The herd takes little offense when members of certain other herds are turned into a corpse. The remedy for this tragedy can never be found entirely within the domains of interstate relations or jurisprudence. It can be found only in diminishing the claims of the herd.

The state, of course, is an instance of the herd, a sacred instance. To prevent genocide, the murderous demands of the state must yield to the requirements of personhood. However, these demands can never be suppressed through the dead world of ordinary politics. This can be achieved only through the creation and recreation of Self.

The task is to migrate from the Kingdom of the State to the Kingdom of the Self. But in this movement one must also *want* to live in the second kingdom. This is the most difficult part of the needed migration because the Kingdom of the State has immense attractions. The risks of

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34. A good example of such coexistence is Cambodia. When the Vietnam War began to spill over into neutral Cambodia, Prince Norodom Sihanouk — who brought his country independence from France in 1954 — was overthrown by a right-wing military faction headed by Lon Nol. That was in March of 1970. A little more than five years later, on April 17, 1975, the victorious rebels known as Khmer Rouge entered Phnom Penh, and began a four-year rule of murder and genocide in which almost two million Cambodians were executed or starved to death. The terrible story is already a familiar one, especially to those of us who recall the vivid scenes from the movie "The Killing Fields" or who remember that it was heavy American bombing that first helped bring Pol Pot and the Khmer Rouge to power. Enduring all that maddens and torments, Cambodia lived in the thickening shadow of meaningless death until the Christmas of 1978, when Vietnam invaded with a force of 120,000 men and installed its own client government. Today, Vietnam has withdrawn its troops from Cambodia, and Sihanouk (who officially boycotted the Cambodian peace talks in Bogor, Indonesia) has expressed fear of a return to power by the Khmer Rouge. Indeed, says Sihanouk, "Another holocaust is becoming inevitable."

living within this kingdom become apparent only when the possibilities of migration no longer exist.

In the end, the problem of genocide is a problem of individuals. states can exploit the genocidal aspects of *Realpolitik* because these aspects satisfy the needs of *normal* human beings. In treating others as foul or pestilential, these people affirm at the same time that *they* belong to an elite. There are no special requirements for membership in this elite, save membership in a dominant group of the state, but this seems to do nothing to undermine the benefits of "belonging." It is difficult to overestimate the importance of the herd — the emotional advantages of *belonging* to the state — in explaining genocide.

It follows from all this that before we can extricate ourselves from the most lethal expressions of *Realpolitik*, individual human beings will need to discover alternative (to jingoism) and more authentic sources of reassurance. But this is easier said than done. The journey from the herd to *personhood* begins in myth and ends in doubt. For this journey to succeed, the individual traveler must learn to substitute a system of uncertainties for what he has always believed — to learn to tolerate and encourage doubt as a replacement for the comforting woes of statism. Induced to live against the grain of our civilization, he must become not only conscious of his singularity, but satisfied with it. Separated from the herd, he must become aware of the forces that undermine it, forces that offer him a last remaining chance for resisting complicity in genocide.

We may turn to Kierkegaard for guidance. Recognizing the "crowd" as "untruth," he warns of the dangers that lurk in submission to multitudes:

> A crowd in its very concept is the untruth, by reason of the fact that it renders the individual completely impenitent and irresponsible, or at least weakens his sense of responsibility by reducing it to a fraction . . . . For "crowd" is an abstraction and has no hands: but each individual has ordinarily two hands . . . .

The task, then, is for each individual to become a person. Rejecting the idolatry of militaristic nationalism, each man and woman must learn to understand the lethal encroachments of the state. Recognizing in most of their leadership elites an incapacity to surmount collective misfortune (war as well as genocide), each person must strive to produce his/her own private expression of progress. "From becoming an individual no one," says Kierkegaard, "is excluded, except he who excludes himself by becoming a crowd."

We have seen that to fulfill the expectations of a new global society — one that would erect effective barriers around the crime of genocide — initiatives must be taken *within states*. Current national leaders can never be expected to undertake the essential changes on their own. Rather, these changes can come only from informed (actualized) publics throughout the world.

If all of this sounds grandly unpolitical, it is because politics as usual

cannot prevent genocide. If it all sounds hopelessly idealistic, it must be recognized that nothing could be more fanciful than relying upon the power of modern international law or upon the dynamics of geopolitics. Before we assume that genocide is a permanent fixture of contemporary international relations, we must understand that politics can change. And since law follows politics, the transformation of lethal forms of inter-state competition into new archetypes for global society can give new and effective meaning to anti-genocide norms.[35]

35. Such transformation could also give new and effective meaning to norms intended to control another major category of crimes in international law — the category concerned with terrorism. In this connection, these norms are already codified in a number of major treaties and conventions. *See especially* Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted by* the U.N. General Assembly, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, *reprinted in* 13 I.L.M. 43 (1974) (entered into force for the United States, Feb. 20, 1977); Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force for the United States, Dec. 13, 1972); Convention on Offences and Certain Other Acts Committed on Board Aircraft ("Tokyo Convention"), September 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941 (entered into force for the United States on December 4, 1969); Convention For the Suppression of Unlawful Seizure of Aircraft ("Hague Convention"), December 16, 1970, 22 U.S.T. 1641 (entered into force for the United States on Oct. 14, 1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("Montreal Convention"), September 23, 1971, 24 U.S.T. 564 (entered into force for the United States on Jan. 26, 1973); Internation Convention Against the Taking of Hostages of December 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979) (entered into force on June 3, 1983) (entered into force for the United States on December 7, 1984); European Convention on the Suppression of Terrorism, January 27, 1977, E.T.S. 90 (entered into force on August 4, 1978). On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage-taking and attacks on internationally protected persons that were criminalized by previous custom and conventions. *See* UNITED NATIONS RESOLUTION ON TERRORISM OF DECEMBER 9, 1985, G.A. Res. 40/61, 40 U.N. GAOR, Supp. (No 53) at 301, U.N. Doc. A/40/53 (1985).

International Human Rights And Family Planning: A Modest Proposal

BARBARA STARK*

INTRODUCTION

This paper proposes that the U.S. begin to take a more positive role in advancing international human rights by reaffirming its historic commitment to international family planning efforts. Specifically, I suggest that we rescind the Mexico City Policy ("MCP"),[1] repeal the Helms Amendment[2] and explicitly apply internationally accepted human rights norms to our population program. While the repudiation of the MCP and the Helms Amendment suggests a return to an earlier era in family planning, the focus on the human rights implications represents a substantial departure from our former policy. This reflects both the growing international sensitivity to human rights since the inception of that policy in the early seventies, and our own reevaluation of the "population problem" in the early eighties.[3] Unlike Swift's scathing satire, this truly is a "modest proposal." I do not suggest that complex family planning problems can be solved by the availability of contraception, including abortion.[4] But un-

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1. The MCP terminated all U.S. aid to family planning services engaging in abortion related activities or speech. *See infra* text accompanying notes 18-27.

2. 22 U.S.C. § 2151b(f)(1)(2)(Supp. V 1982). The Helms Amendment prohibits direct funding of abortion through nongovermental organizations. *See infra* text accompanying notes 14-15.

3. In the World Bank's 1984 WORLD DEVELOPMENT REPORT 155, a distinction is made between "family planning programs [which] provide information and services to help people achieve their own fertility objectives" and "population policy [which] involves explicit demographic goals." In this paper, unless otherwise specified, "population policy" and "family planning services" both refer to programs providing aid and services to individuals. Since a discussion of policy regarding aggregate fertility is beyond the scope of this paper, there is no need for separate terms here.

In any case, as suggested at text accompanying notes 104-11, *infra*, family planning policy affects population, albeit indirectly. This is not a simple issue. As Donald Strauss, former chair of Planned Parenthood Federation of America has observed, commenting on the Chinese government's efforts to reduce its population growth rate and resultant disregard of human rights: "One of the dilemmas of our times is to equate the near and poignant human rights of individuals now alive with the distant and difficult to imagine rights of those still to be born." N.Y. Times, May 11, 1989, letter to the editor by D. Strauss, at A28, col.6.

4. Rather, I agree with John Ratcliffe, who has argued that " . . . overpopulation and underdevelopment . . . can most effectively be resolved through a combination of widespread social advancement and availability of the full range of birth control methods.." Ratcliffe, *The Reagan Population Policy: An Error of the Third Kind*, 20 N.Y.U. J. INT'L L. &

less such contraception is available, it is difficult to even begin to address these issues.[5]

The utilization of human rights standards in this context is concededly problematic. What are the human rights that would be promoted? Are these rights recognized by the U.S.? What, if anything, is gained by analyzing family planning issues in terms of human rights, rather than as questions of public policy? I will argue that a rights analysis is essential here for three basic reasons.[6] First, a clear focus on rights should help us avoid the rights violations that have marred family planning programs in the past. Second, the grave global problems of reproductive choice demand a principled, universal approach. Third, it is important that these issues are understood in terms of rights because the exercise of rights as such by Third World women, who are most affected by U.S. family planning policy, may help them to begin to address other aspects of their oppression.[7] The experience of exercising rights itself contributes to empowerment.[8] Family planning is a natural place to start because it involves issues central to the Third World woman's daily life.

This paper is divided into three parts. In the first part, I briefly describe the current U.S. position, its origins and consequences. In the second part, I suggest that U.S. family planning support be structured and evaluated in accordance with widely accepted international human rights norms and pertinent domestic constitutional standards. From this, I derive a "hybrid" rights formulation linking international notions of affirmative rights with the American idea of reproductive choice as a fundamental right. In the last part, I analyze the possible impact of the hybrid

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POL. 267, 298 (1987).

5. *See* Farley & Tokarski, *Legal Restrictions on the Distribution of Contraceptives in the Developing Nations: Some Suggestions for Determining Priorities and Estimating Impact of Change*, 6 COLUM. HUM. RTS. L. REV. 415, 418 (1974-75) (significant numbers of people in developing countries have decided to limit family size but cannot do so because contraceptives are either physically or economically unavailable to them); R. REPETTO, WORLD ENOUGH AND TIME: SUCCESSFUL STRATEGIES FOR RESOURCE MANAGEMENT 43 (1986)(most households in Third World countries where birth and death rates are high do not have access to family planning services); Johnson-Acsadi, *The Scale of the Problem*, 15 PEOPLE 3 (1988) ("Among 22 developing countries, from 13-51% of women aged 15-49 reported having had an unwanted pregnancy or live birth in the two years before the survey took place . . . .").

6. *See generally Symposium: The Civil Liberties and Human Rights Implications of United States International Population Policy*, 20 N.Y.U. J. INT'L L. & POL. 1 (1987); *Rights of Choice in Matters Relating to Human Reproduction: Part I of a Symposium on Law and Population*, 6 COLUM. HUM. RTS. L. REV. 273 (1974-75).

7. *See generally* G. LERNER, THE CREATION OF PATRIARCHY, 233-35 (1986) (comparing the terms "oppression" and "subordination" of women).

8. *See* Lefort, *Politics and Human Rights*, in POLITICAL FORMS IN MODERN SOCIETY (M.I.T. 1986) (arguing that awareness and assertion of rights as rights are a crucial part of a trans- formative political process). Third World women are among the most oppressed people on earth. *See* Hosken, *Toward a Definition of Women's Human Rights*, 3 HUM. RTS. Q. 1, 2 (1981).

formulation on some specific human rights.[9] These include the rights to reproductive choice, equality, health and an "adequate" standard of living.

I. BACKGROUND

A. *U.S. Support for International Family Planning*

A brief history background of U.S. participation in international population planning efforts may be useful in evaluating the political feasibility of the proposal for a revised U.S. role.[10] Even the most perfunctory review shows not only that until very recently the U.S. actively supported international family planning, but that dramatic shifts in policy in this area have been — and can be — implemented in a relatively short period of time.

The U.S. has supported international family planning services for more than twenty-five years. In 1961, AID (Agency for International Development) was established to coordinate U.S economic and humanitarian aid programs.[11] In 1967, the Foreign Assistance Act of 1961 was amended by the passage of Title X. This authorized broad population planning support, including the construction of family planning clinics and funding for research programs. AID funding was increased from $4.4 million to $34.8 million.[12]

In 1973 the U.S. shifted the emphasis of its foreign aid program from large to small scale projects. Family planning was a keystone of this "New Directions" strategy, reflecting the general consensus among policymakers that Third World countries "could not effectively address pressing social and economic problems until modern methods of contraception were introduced on a mass scale."[13]

In the same year, the senate passed the Helms Amendment to the Foreign Assistance Act.[14] The Helms Amendment prohibits direct funding of abortion through nongovernmental organizations ("NGOs").[15] As a practical matter, such direct funding had never comprised a significant proportion of AID and was easily channeled elsewhere. Thus, the direct impact of the Helms Amendment on international population programs

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9. *Cf.* Price-Cohen, *International Fora for the Vindication of Human Rights Violated by the U.S. International Population Policy*, 20 N.Y.U. J. INT'L L.& POL. 241, 248 (1987) (noting the analytic problems of demonstrating that existing policies violate human rights).

10. For a comprehensive discussion of the history of the program, see Fox, *American Population Policy Abroad: The Mexico City Abortion Funding Restrictions*, 18 N.Y.U. J. INT'L L. & POL. 609, 611 (1986).

11. Fox, *supra* note 10, at 611.

12. *Id.* at 614.

13. *Id.* at 611.

14. 22 U.S.C. § 2151b(f)(1)(2) (Supp. V 1982).

15. The constitutionality of the Helms Amendment has generally been conceded. Comment, *International Family Planning*, 8 HOUS. J. INT'L L. 155, 170 (1985) [hereinafter "*Houston Comment*"].

was not great. Support for other forms of family planning remained high.

The U.S. had supported the International Planned Parenthood Federation ("IPPF") since 1968 and U.S. contributions constituted almost 25% of the IPPF's budget for 1984.[16] In 1986, the U.S. was the largest single contributor to U.N. sponsored family planning programs.[17] AID was the single greatest source of funding for overseas family planning.

B. *The Mexico City Policy ("MCP")*

In August, 1984, the U.N. Population Conference in Mexico City was convened to reevaluate the World Population Plan of Action adopted in 1974.[18] The Reagan administration viewed the Mexico City Conference as an opportunity to demonstrate its vehement opposition to abortion to the world, as well as its right wing constituency.[19] Promulgation of the MCP unequivocally showed that undermining support for international family planning had become a high priority of the Administration.[20] The MCP effectively extended the application of the Helms Amendment far beyond that which had been contemplated by the Senate. This was accomplished by the imposition of two additional conditions. First, foreign recipients were forbidden to engage in any abortion related activities or speech. Second, they were prohibited from doing so regardless of the funding source of such activities.[21]

This policy has had profound consequences for both the population planning NGOs and those they serve.[22] As Sharon Camp points out, the MCP jeopardized over 120 family planning projects worth almost $23 million annually.[23] The maneuvers required to remain eligible for funds dis-

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16. Camp, *The Impact of the Mexico City Policy on Women and Health Care in Developing Countries*, 20 N.Y.U. J. INT'L L. & POL. 35, 37 (1987).

17. DKT Memorial Fund Ltd. v. Agency for Int'l Dev., No. 88-5243 (D. Cal. Oct. 10, 1989) (Ginsburg, J., concurring in part and dissenting in part).

18. Fox, *supra* note 10, at 628. For a description of the World Population Conference in Bucharest in 1974, see B. HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL AND REPRODUCTIVE CHOICE 107-10 (1987).

19. *See* B. HARTMANN, *supra* note 18, at 123-25; *see also* Fox, *supra* note 10, at 633 (noting that the MCP was "met with hostility" from most [Third World] delegates). *See generally* Cook & Dickens, *International Developments in Abortion Laws: 1977-78*, AM. J. PUB. HEALTH 1305, 1310 (1988) ("The prevailing U.S. initiative [as expressed in the MCP] runs counter to the evolving trend of worldwide abortion reform.")

20. The MCP has been criticized as a cynical political capitulation to the efforts of an activist minority, including substantial support from organized religion. *See* B. HARTMANN, *supra* note 18, at 244. For an incisive analysis of the role of the Catholic church in the formulation of family planning policy, see Benshoof, *The Establishment Clause and Government-Funded Natural Family Planning Programs: Is the Constitution Dancing to a New Rhythm?* 20 N.Y.U. J. INT'L L. & POL. 1 (1987).

21. *U.S. Population Policy as Announced in Mexico City, 1984: A Background Statement Prepared by the ACLU Reproductive Freedom Project* 3 [hereinafter "*ACLU Statement*"].

22. *Id.*

23. Camp, *supra* note 16, at 50. IPPF/WHR received a $27 million extension of a

rupted the population establishment. IPPF, for example, initially took a unified approach, refusing to require its 117 member associations to stop all abortion activities. In 1985, however, the Western Hemisphere Region section of IPPF agreed to AID's restrictions, thus undermining Planned Parenthood Federation of America's efforts to reverse them.[24]

According to the Population Crisis Committee ("PCC"), which undertook a study of the effects of the MCP in 1987, most of the agencies questioned were not yet operating under the anti-abortion restrictions. Those organizations which had implemented the MCP standards reported that they had: (1) incurred substantial increases in administrative costs (in connection with monitoring their subgrantees);(2) avoided certain countries and categories of foreign organization;(3) phased out research on the consequences of illegal abortions;(4) disassociated themselves from medical research that might be considered abortion-related;(5) were generally "chilled" in their provision of services, and (6) inadvertently violated the MCP.[25] As Camp observes:

> In the end, however, the most pervasive and devastating effect of the policy will be felt by women in developing nations who rely on the integrity of the health professionals funded by the U.S. government. By depriving those women of all information about the availability and advisability of abortion, the [MCP] inevitably will prevent women from obtaining medically necessary abortions and will cause women to bear children at great risks to their physical health."[26]

As this capsule history suggests, the risks and uncertainties to which the vagaries of our political system subject recipient states and NGOs is a very real problem. By its nature, the success of family planning depends on continuity.[27] Just as the community must be able to rely on the programs, they in turn must be able to count on their funding sources. This is an important reason for protecting such decisions from executive caprice. As I will argue in the next part of this article, one way to do so may be by giving such aid the status of rights.

C. *"Overpopulation" or underdevelopment?*

While deploring the anti-abortion focus of the MCP, Betsy Hartmann has observed that it raised important questions about the underlying premises of the Western population establishment. Moreover, it reflected a new recognition of the critical role of development in population programs.

Matching Grant from AID. 1987 ANNUAL REPORT IPPF/WHR 13.

24. B. HARTMANN, *supra* note 18, at 114.

25. Camp, *supra* note 16, at 41-48.

26. *Id.* at 50.

27. Farley & Tokarski, *supra* note 5, at 439. *See* Crossette, *Why India is Still Failing to Stop Its Population Surge*, N.Y. Times, July 9, 1989, § 4, at 2, col 1 (Indian experts attribute large families, in part, to "a dearth of sustained information and follow-up services.").

There are basically two views of population growth. One, as epitomized by the World Bank's Report on Population 1984,[28] may be referred to as the "population explosion" view.[29] Its adherents argue that overpopulation, resulting in intense competition for scarce resources, is a primary cause of poverty and starvation. They believe that the sheer number of human beings and the rate at which they are reproducing amounts to a global crisis.

The other view, which I will call the "development view," considers the high fertility rate that leads to burgeoning population more a symptom than a cause of poverty. As Hartmann explains, having many children is sensible and rational in an agrarian society dependent on child labor. Moreover, the lack of pensions or social security programs means that children are the only insurance for a couple's old age. High infant mortality makes it necessary to have many children in order to be sure that some will survive to adulthood. Finally, from the development view, the issue of the demand on global resources by an expanding Third World population is specious since we in the West still consume far more than they do, by any logical measure, because our per capita consumption is so high.[30] Thus, the argument continues, "population explosion" is the racist, elitist rallying cry of a West in fear of being overrun by dark hordes.[31] Population control, according to proponents of the development view, requires both freely available family planning services and a more equitable distribution of wealth. Compelling statistics demonstrate that the correlation between lowered fertility and development depends more on the equitable distribution of resources than the GNP per capita.[32] Where individual families benefit economically from development, they are apt to have fewer children.

The drafters of the MCP, while rejecting the economic analysis of the development view, denied that population growth presents a significant problem. Even if growth were undesirable, they argued, the correlation between increased industrialization and declining birthrate[33] indicates that the best way to deal with it is through economic development. The Reagan administration concluded that a vigorous free market economy was the best way to stimulate development, which it assumed would lead to lower birth rates. Even if this is so, as the World Bank has tersely observed, "many developing countries cannot afford to wait for fertility to

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28. *Houston Comment*, *supra* note 15, at 156. *See, e.g.*, Ratcliffe, *supra* note 4, at 267 n.1.

29. *See* P. EHRLICH, THE POPULATION BOMB (1968).

30. OUR COMMON FUTURE: WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 95 (1987) [hereinafter "*Our Common Future*"]. Close to 25% of the world's inhabitants consume less than five percent of the world's output; a similar percentage in the industrialized countries consume more than two-thirds. *See* R. REPETTO, *supra* note 5, at 42.

31. *See* B. HARTMANN, *supra* note 18, at 95-98 (discussing the confluence of the eugenics and birth control movements).

32. *Id.* at 273; *Our Common Future*, *supra* note 30, at 106.

33. *Houston Comment*, *supra* note 15, at 172.

decline spontaneously"[34] in response to projected economic development.

Both the development and the population explosion views may have human rights repercussions. To the extent the population explosion analysis is used to justify the abrogation of the individual's reproductive choice on the grounds of national necessity, it violates a human rights approach to family planning. To the extent that the development approach incorporates the neo-Malthusian view that population is self-regulating, through high mortality or natural family planning, it too becomes a mechanism for curtailing reproductive choice.

II. STANDARDS

Both the affirmative economic, social and cultural rights set forth in the international instruments and the fundamental privacy rights assured by the U.S. constitution are necessary to solve the problems of population policy. Neither approach is sufficient in itself in the international family planning context. Indeed, as I will show in this section, their inadequacies complement each other. This suggests the need for a "hybrid" formulation, a selective blend of the two rights traditions, in which the affirmative rights of the international instruments are qualified by the American notion of fundamental privacy rights, which they simultaneously expand. In developing this synthesis, this part of the paper attempts to provide a workable example of the constructive interplay of American and international conceptions of rights.

A. *International Instruments*

There are at least two basic reasons for considering questions of international family planning in terms of human rights, as these rights have been interpreted in the international human rights instruments. First, by utilizing these terms, we place these issues squarely in the context of internationally accepted norms. This clarifies and narrows the debate. Second, by recognizing the rights consequences of these policy decisions, we acknowledge and articulate the constitutive principles to which law, policy and even presidents must conform. If the U.S. is serious about human rights, and expects to be taken seriously by the rest of the world, we must consider the human rights implications of our policies. The following international treaties provide widely accepted and clearly articulated standards pertinent here: the International Covenant on Civil and Political Rights ("Civil Covenant"), the International Covenant on Social, Economic and Cultural Rights ("Economic Covenant") and the Convention on the Elimination of All Forms of Discrimination Against Women ("Women's Convention").[35]

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34. *Id.* at 162.

35. G.A. Res. 180 (XXXIV 1979), *reprinted in* 19 I.L.M. 33 (1980), adopted by the General Assembly on Dec. 18, 1979, entered into force on Sept. 3, 1981. *See generally* Cook, *The International Right of Nondiscrimination on the Basis of Sex - A Bibliography*, 14

We should adopt the norms established in these instruments as guidelines for the formulation of American international family planning policy for several reasons.[36] First, they provide an invaluable indication of the priorities and values held by most of the international community,[37] including the high priority given economic rights in the Third World. By demonstrating our commitment to these globally accepted principles,[38] we show good faith and thereby enhance our credibility. Other states would probably be more receptive to our criticism if we were more open to theirs.[39] Thus, we should adhere to these norms, unless they clearly conflict with our own principles,[40] because they express a global consensus against which the rest of the world will judge our actions.[41]

Second, Article 18 of the Vienna Convention on the Law of Treaties imposes a special obligation with respect to treaties we have signed: "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty [which] . . . it has signed . . . until it shall have made its intention clear not to become a party to the treaty. . . ."[42] The Economic and Civil Covenants as well as the Women's Convention were among those signed by President Carter.[43]

YALE J. INT'L L. 161 (1989); Byrnes, *The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1 (1989); Heller, *International Convention on Women's Rights: Bringing About Ratification in the United States*, 9 WHITTIER L. REV. 431 (1987).

36. *See supra* text accompanying notes 95-98 (applicable norms under the Civil Covenant, and notes 111-12 (applicable norms under the Economic Covenant *infra*). *Cf.* Coliver & Newman, *Using International Human Rights Law to Influence Population Policy: Resort to Courts or Congress?*, 20 N.Y.U. J. INT'L L. & POL. 53, 84 (1987) (discussing the derivation of "judicially manageable standards" from international law in this context).

37. *See generally* L. HENKIN, THE RIGHTS OF MAN TODAY (1978); J. NICKELS, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1987). *But cf.* Galey, *International Enforcement of Women's Rights*, 6 HUM. RTS. Q. 463 (1984) (problems of enforcement of women's rights, and prospects for improvement).

38. *See generally* Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1 (1982).

39. "We should not give the impression that we are mainly interested in enforcing human rights elsewhere while avoiding any change in our own law or practice." SENATE COMM. ON FOREIGN REL., HUMAN RIGHTS TREATIES, SENATE ADVICE AND CONSENT, S. REP. No. 381-14.2, 96th Cong., 1st Sess. 88 (1979) [hereinafter "*Senate Hearings*"] (Prepared Statement of Professor Oscar Schachter). *But cf.* Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 73 (1978) (General right of censure should not be limited to those states which are parties to the international rights instruments).

40. *Cf. infra* text accompanying notes 71-78 (discussing the abortion of female fetuses).

41. *See generally*, HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 981-83 (1987) [hereinafter "*International Law*"]; Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31 (1978).

42. Vienna Convention on the Law of Treaties, May 22, 1969, art. 18, U.N. Doc. A/CONF. 39/27 at 17 (1969) (entered into force Jan. 27, 1980), *reprinted in* 8 I.L.M. 679, 686 (1969); *accord* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 312, at 173 (1987) [hereinafter "*Third Restatement*"].

43. *President Carter Signs Covenants on Human Rights*, DEP'T. ST. BULL., Oct. 31,

The right to abortion, however, is conspicuous by its absence from the international instruments.[44] As Joan Fitzpatrick Hartman has pointed out:

> None of the human rights instruments contain an explicit right of personal choice for women seeking to terminate their pregnancies. In the only international case directly confronting access to abortion as a privacy right, the European Commission on Human Rights did not find a choice of pregnancy termination within the right to privacy and family protection under the European Convention.[45]

The failure of these instruments to recognize a woman's right to terminate her pregnancy may be attributed to several factors, including the prevalence of patriarchy[46] and the political influence of religions such as fundamental Islam[47] and Catholicism, which are opposed to abortion. Under local law, for example, abortion is illegal or permitted only where the woman's life is at stake in most of the Muslim countries of Asia, two-thirds of the Latin American countries and much of Africa.[48] As I will explain in the next section, the extent to which local laws conflict with rights well established in our jurisprudence, like a woman's right to choose whether or not to terminate a pregnancy, should be considered by the U.S. in allocating assistance.

B. *Domestic Standards*

The right to use contraception, including abortion, is predicated on privacy rights which have been found to be fundamental by the U.S. Su-

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1977, at 586; Message from the President to the Senate transmitting the Convention on the Elimination of All Forms of Discrimination Against Women (Nov. 12, 1980).

44. One of the most creative approaches to this void has been devised by Coliver & Newman, who note that the cited instruments set forth general principles — including the right to health and the right of women to attain access to family planning — which may impose a duty on governments, as a matter of customary international law, to refrain from defunding NGOs when doing so is likely to "seriously threaten the health of a significant number of people," Coliver & Newman, *supra* note 36, at 68-70. They concede, however, that, "Several instruments recognize interests that compete with a mother's interest in free choice," *id.* at 67 (citing American Convention on Human Rights, art. IV, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, doc. 21 rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970); art. 18 of the Civil Covenant.

45. *See* Hartman, *The Impact of the Reagan Administration's International Population Policy on Human Rights Relating to Health and the Family*, 20 N.Y.U. J. INT'L L. & POL. 169, 177 (1987) (citing Bruggemann and Scheuten v. Federal Republic of Germany, 10 EUR. COMM'N H.R. 100 (1978)).

46. *See generally* Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287 (1987) (historical overview of human rights and women's rights movements, urging a unified approach).

47. *See generally* An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987).

48. B. HARTMANN, *supra* note 18, at 245 (citing C. TIETZE, INDUCED ABORTION: A WORLD REVIEW, 1983. Indeed, if reproductive choice had been explicitly assured in the covenants, it is questionable whether they would have been as widely ratified in the Third World. At the very least, reservations probably would have been taken with respect to that right.

preme Court. In *Griswold v. Connecticut*,[49] the Supreme Court invalidated a state law that criminalized the use of contraceptives for married persons. In *Eisenstadt v. Baird*,[50] the protection was extended to single persons: "If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[51] In *Roe v. Wade*,[52] the Court expressly found that the privacy right was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[53] In *Webster v. Reproductive Health Services*,[54] the Supreme Court declined to overrule *Roe*, holding that the state could refuse to allow the use of facilities for abortions as long as it "places no obstacle — absolute or otherwise — in the pregnant woman's path to an abortion."[55] As Justice Blackmun notes in his dissent, the Court does not make a "single, even incremental, change in the law of abortion . . . ."[56] Rather, the *Webster* Court simply persists in the fallacious distinction between a government imposed "obstacle" and indigency, for which the government is not responsible, but which may effectively preclude abortion.

While I agree with Justice Blackmun that the pluralility "obscures the portent" of the decision, and that *Webster* is likely to have dire consequences at home,[57] the decision does not detract from the analysis here. Rather, I am concerned with precisely those obstacles decried by the *Webster* court; i.e., obstacles "placed in the path of women seeking abortions" by government. In the context of international family planning, I urge that the U.S. both avoid creating such obstacles and carefully consider those erected by recipient states.

The other element of the hybrid proposal, i.e., an affirmative economic obligation, is found not in domestic law, but in the international instruments discussed above. The U.S has never found any constitutional obligation on the part of the state to provide contraception or to fund abortions. In *Harris v. McRae*,[58] the Supreme Court held that there was no constitutional entitlement to medicaid funding for abortions even if poor women could not otherwise obtain them. Although a compelling ar-

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49. Griswold v. Connecticut, 381 U.S. 479 (1965).

50. Eisenstatd v. Baird, 405 U.S. 438 (1972).

51. *Id.* at 453.

52. Roe v. Wade, 410 U.S. 155 (1973).

53. *Id.* at 153.

54. Webster v. Reproductive Health Services, 106 L.Ed. 2d 410 (1989); *See generally* Greenhouse, *Supreme Court, 5-4, Narrowing Roe v. Wade, Upholds Sharp State Limits on Abortions*, N.Y. Times, July 4, 1989, at 1, col. 6.

55. *Webster*, 106 L.Ed. 2d at 429, citing Maher v. Roe, 432 U.S. 464, 474 (1977).

56. *Webster*, 106 L.Ed. 2d, at 448 (Blackmun, J., dissenting).

57. "I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since Roe was decided. I fear for the integrity of, and public esteem for, this Court." *Id.* at 449.

58. Harris v. McRae, 448 U.S. 297 (1980).

gument may be made that *McRae* represents a fundamental restriction of the right to choose an abortion, on its own terms it is less about limiting the right to choose than it is about the Supreme Court's refusal to recognize affirmative economic rights:

> To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.[59]

The Supreme Court has consistently refused to accord any economic rights constitutional status.[60] Thus, it is not surprising that the courts have for the most part rejected the argument that the MCP violates the U.S. constitution.[61] If the affirmative economic rights established in the international instruments are recognized and applied in the context of U.S. international family planning programs, however, abortion may well be an entitlement[62]— at least in those countries where a woman may choose to terminate her pregnancy without state interference.

C. *A Hybrid Formulation*

1. Towards a Constructive Synthesis

The international instruments do not recognize women's fundamental right to choose whether or not to terminate pregnancy, a right firmly established under the U.S. constitution.[63] The U.S. constitution, on the

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59. *Id.* at 318.

60. Dandridge v. Williams, 397 U.S. 471 (1970). As Henkin has observed, our emergence in the twentieth century as what some characterize as a welfare state has been accomplished despite the constitution, rather than because of it. L. HENKIN, *supra* note 37, at 128.

61. *See, e.g.*, Coliver & Newman, *supra* note 36, at 77-83; Planned Parenthood Fed'n v. Agency for Int'l Dev., 670 F. Supp. 538 (S.D.N.Y. 1987), *rev'd on these grounds, aff'd on other grounds*, 838 F.2d 649 (2d Cir. 1988) (on remand, oral argument was scheduled for July 21, 1989, on defendant's motion to dismiss for failure to state a claim upon which relief may be granted); telephone interview with Roger Evans, Esq., counsel for plaintiff on June 9, 1989. *See also* DKT Memorial Fund v. Agency for Int'l Dev., 630 F. Supp. 238 (D.D.C. 1986), 810 F.2d 1236 (D.C. Cir. 1987), *rev'd and remanded* 691 F. Supp. 394 (D.D.C. 1987).

62. This would probably not be an absolute right under any of the international conventions, which take a pragmatic approach to economic rights. Under Art. 2.1 of the Economic Covenant, for example, a state is required "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." In any case, for purposes of this paper I am assuming voluntary U.S. accession to international norms, rather than the imposition of any enforceable duty against the U.S. *But cf. Senate Hearings, supra* note 39, at 91 (statement of Professor Louis Sohn, explaining that this language is "obligatory . . . [creating] a legal duty to take such steps, and this duty needs to be fulfilled in good faith").

63. *But see, e.g.*, Greenhouse, *Battle Over; Now, a War: Three New Cases Will Put*

other hand, fails to address the economic, social, and cultural circumstances which may well render the enjoyment of that right nugatory. Thus, I suggest a "hybrid" approach to international family planning, combining the affirmative rights described in the international covenants with the fundamental right to reproductive choice guaranteed under the U.S. constitution. Under such a hybrid rights formulation, U.S. funded family planning programs would treat reproductive choice, including abortion, as a fundamental right and would also recognize the affirmative economic, social and cultural rights of the individual program participants.[64]

This is not the same obligation that the U.S. would assume by adhering to the international covenants. While ratification of the covenants might give rise to an inchoate right to development under Art. 2(1) of the Economic Covenant,[65] it would not necessarily require us to further the affirmative rights of citizens of other countries. Under the conventions, affirmative rights are to be provided by the individuals' own state. In addressing those rights, the U.S. would be contributing to the state's efforts to further the rights of its own people.[66]

U.S. recognition of reproductive choice and affirmative rights means that the U.S. would not only refrain from imposing any constraints on family planning program participants which would interfere with their enjoyment of such rights, but also that the U.S. would evaluate family planning programs in terms of their rights consequences. A rights analysis would provide the basic framework in which the U.S. operated and assessed its family planning programs, subject to the pre-existing law of the local state.[67]

Supreme Court on a Collision Course with Roe v. Wade, N.Y. Times, July 5, 1989 at 1, col. 4; Fein, "The Court is Ready to Overturn 'Roe' ", *See id.* at A21, col.1; *cf.* Gross, *Goaded by Ruling, Groups Plot State-by-State Plan to Keep Abortion Rights*, *see id.* at A17, col. 1.

64. This would encourage, although it would not assure, the "extraordinary result" contemplated by the *McRae* Court; i.e., an "affirmative funding obligation" with regard to abortion notwithstanding the absence of specific legislation. *See generally* HALBERSTAM & DEFEIS, WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS, AN ALTERNATIVE TO ERA? (1987) (comparing women's rights under U.S. law with women's rights under the international covenants).

65. *See* SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 331- 32 (1985); DRAFT DECLARATION ON THE RIGHT TO DEVELOPMENT, U.N. Doc. A/40/277 (1985).

66. The vast majority of Third World U.N. member states have adhered to the covenants. *See supra* note 41, at 994. Even if the recipient state had not adhered to the covenants, however, under this proposal the U.S. would refer to the standards established in those instruments because of the global acceptance of these standards (*see infra* text accompanying notes 37-41) and because of their concrete importance to the Third World, especially Third World women. (*See infra* text accompanying notes 95-128.).

67. For tables showing circumstances under which abortion is permitted worldwide, see "Regional Developmemts in Abortion Laws: 1967-1988" (chart referencing countries that have changed abortion law since 1968, available from IPPF); C. TIETZE & S.K. HENSHAW, INDUCED ABORTION: A WORLD VIEW (6th ed. 1986); Cook & Dickens, *supra* note 19, at 1306-307 (chart showing "Legislative Developments in Indications for Abortion: 1977-1988")

U.S. recognition of these rights would not, of course, affect their status under local law. If local law imposed intolerable constraints on rights, however, the program could be terminated. It is beyond the scope of this paper to define "tolerable" rights parameters, which would probably have to be determined on a fact-specific, case by case basis. Local law punishing parents for having more than one child, for example, would probably be fatal to a program under a hybrid rights framework, as would the distribution of contraceptives posing a significant health risk. A strong argument could be made that a local bar on abortion would similarly so contravene basic rights as to mandate defunding by the U.S..[68] This contention would probably not prevail, however, in view of the historic U.S. support of family planning programs which have not included abortion and the practical consequences of terminating such programs.

There is no constitutional impediment to the synthesis urged, no constitutional proscription against a more expansive construction of the right to choose. Indeed, thirteen states currently pay for abortions with state Medicaid funds.[69] The adoption of affirmative economic rights, while resisted as a matter of constitutional jurisprudence, may be palatable in the limited context of international family planning for several reasons.[70] First, the political considerations underlying Congress' decision not to fund abortions at home may no longer be applicable abroad.[71] Public policy justifications for supporting family planning programs, including those offering abortion, may be more compelling in an international than in a domestic context. It may be particularly crucial for a woman to have the option of terminating her pregnancy where access to effective forms of contraception may be limited, where the health risks associated with pregnancy and childbirth are great, and where the mother will almost invariably assume primary responsibility for the infant.[72] Abortion

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68. *Webster* , 106 L.Ed. 2d 410 (affirming that Texas statute in *Roe v. Wade* criminalizing all abortions, except where women's life was at stake, was unconstitutional under the Due Process Clause).

69. As of June 25, 1989, thirteen states paid for abortions without restrictions with state Medicaid funds: Alaska, California,Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Washington, West Virginia and Vermont. Four additional states will pay for abortions in cases of rape, incest or to save the woman's life. All of the remaining states will pay for abortions to save the woman's life. *Where Abortion Laws Stand Now, State by State*, N.Y. Times, June 25, 1989, at 20, col.4.

70. Affirmative economic rights are increasingly acceptable. As Professor Henkin has noted, "[Is] it not the case that people today have recognized and ordained that it is among the purposes of government to ensure every inhabitant — as of right, not by grace and charity — [receives] the basic human needs (food, shelter, health care, education) when the individual cannot provide them?" Henkin, *The United States Constitution as Social Compact*, 131 PROC. AM. PHIL. SOC'Y 261 (1987).

71. *See supra* note 20. Indeed, Congress recently voted funds for rape and incest victims, although it was unable to override President Bush's veto. N.Y. Times, Oct. 25, 1989, at A1. *See also* Wicker, *A President's Beholden*, N.Y. Times, Nov. 21, 1989, at A25, criticizing President Bush's veto of renewal of aid to the U.N. Population Fund for family planning services explicitly excluding abortion.

72. *Cf.* M. GLENDON, DIVORCE AND ABORTION IN WESTERN LAW 53-57 (1987) (describing

funding in the Third World may further be warranted by intolerably high infant and maternal mortality rates[73] and widespread destitution contributing to human misery on a scale inconceivable in this country.[74]

This contextual approach to population issues finds support in Mary Ann Glendon's comparative study of abortion in western Europe and the U.S..[75] In her book, Professor Glendon compares the abortion laws of eighteen western European countries, the U.S. and Canada. She finds that most countries permit abortion for "cause," such as serious danger to the women's health, likelihood of serious disease or defect in the fetus,[76] or a "variety of circumstances which pose exceptional hardship for the pregnant woman."[77]

As Professor Glendon points out, these findings parallel American public opinion polls over an extended period of time.[78] A recent poll again shows that support for the woman's right to choose abortion depends on the reason suggested for her decision. Eighty-seven percent of those polled thought a woman should be able to obtain a legal abortion if her health was seriously endangered by the pregnancy, while only twenty-six percent thought abortion should be available if the pregnancy interfered with work or education.[79] From a public policy perspective, Congress may be more willing to finance family planning, including abortion, abroad than at home because of the well-documented health risks associated with repeated pregnancies among women in the Third World. Even when the notion of entitlement was far less widely accepted than it is today, liberal theorists argued that society had some duty to those who would be otherwise unable to survive.[80]

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social services and financial support provided in Europe for mothers and infants); *see also* L. NSIAH-JEFFERSON, *Reproductive Laws, Women of Color and Low Income Women* in REPRODUCTIVE LAWS FOR THE 1990's (S. Cohen & N. Taub eds. 1989).

73. Cook, *U.S. Population Policy, Sex Discrimination and Principles of Equality Under International Law* 20 N.Y.U. J. INT'L L. & POL. 93 (1987) (quoting Dr. Hafdan Mahler's speech inwhich he noted that "[The developing] countries commonly have maternal mortality rates 200 times higher than those of Europe and North America — the widest disparity in all statistics of public health". *Id.* at 93).

74. I am assuming that the aggregate impact of these factors could be legitimately taken into account by Congress for purposes of supporting family planning services; i.e., services that assist individual women in avoiding or terminating a pregnancy. This is not to imply that such factors justify U.S. accession to foreign demographic goals.

75. M. GLENDON, *supra* note 72.

76. These are among what she characterizes as "hard grounds," which also include pregnancy resulting from rape or incest. *Id.* at 14.

77. Professor Glendon calls these "soft grounds." *Id.* at 14.

78. *Id.* at 41.

79. Dionne, *Poll on Abortion Finds the Nation is Sharply Divided*, N.Y.Times, Apr. 26, 1989, at 1, col. 6.

80. *See* J. LOCKE, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS § 43, at 189 (P. Laslitt ed. 1967); J.S. MILL, *The Province of Government* from PRINCIPLES OF POLITICAL ECONOMY Book V, Chap. XI (1871), *reprinted in* HELD, PROPERTY, PROFITS AND ECONOMIC JUSTICE 178, 182 (1980). *See also* R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 340 (1948) ("The

2. Conflicts Between International and Domestic Norms

Under the U.S. Constitution, abortion may be elective until fetal viability. The state cannot inquire into the woman's motive for abortion. In the Third World, however, the overwhelming preference for male children raises the question of "discriminatory" abortion. In India and China, for example, abortion has been used to select the sex of the infant.[81] The routine abortion of female fetuses arguably violates the Women's Convention, which requires party states to:

> [T]ake all appropriate measures . . . [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes. [82]

There appears to be a conflict between the two standards.

In ratifying treaties, it is well settled that the U.S. shall not bind itself with regard to provisions of dubious constitutionality.[83] While the treaty may be ratified, the U.S. will typically take reservations with respect to such provisions.[84] A similar approach could be adopted in determining which standard to apply here. One alternative would be to disregard the Women's Convention insofar as it conflicts with the right articulated in *Roe v. Wade*.[85] Thus, abortions for purposes of sex selection would not be challenged. After all, in the U.S. there is no legal proscription against such abortions. In the U.S., however, there is no widespread female infanticide. Nor is the perception that girls are worth less than boys so prevalent.[86]

Perhaps the value of the international standards can best be appreciated in addressing this kind of situation, which is basically without analog in our society. Although Americans would presumably be offended by abortion to choose the sex of the child, individual decisions to do so (as opposed to legislative requirements) would probably not violate our Constitution. Sex selection as a " 'cleaner' method of female infanticide"[87]

New Deal established the principle that the entire community through the agency of the federal government had some responsibility for mass welfare."); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 267 (1980).

81. B. HARTMANN, *supra* note 15, at 247; *see also* McNamara, *The Population Problem: Time Bomb or Myth*, FOREIGN AFFAIRS 1107 (Summer 1984) (discussing abortion of female fetuses in response to coercive birth control programs in China).

82. Art. 5(2), *Women's Convention*, *supra* note 35.

83. RESTATEMENT (THIRD), *supra* note 42, § 302, at 155; Reid v. Covert, 345 U.S. 1 (1957).

84. RESTATEMENT (THIRD), *supra* note 42, §§ 313-14, at 179-89.

85. Roe v. Wade, 410 U.S. 113 (1973).

86. This perception, of course, is not unknown in the West. *See, e.g.*, G. Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex* in TOWARD AN ANTHROPOLOGY OF WOMEN 160 (1975).

87. B. HARTMANN, *supra* note 18, at 248.

may well be barred, on the other hand, by the above-cited provision of the Women's Convention, which mandates the "elimination . . . of practices . . . based on the idea . . . of inferiority [of females]."[88] The Women's Convention provides a jurisprudential structure for our objections, enabling us to distinguish them from mere cultural bias and to grapple with the issue in a principled manner. While it is beyond the scope of this paper to attempt to resolve this dilemma,[89] the problem illustrates the indispensability of international norms in the formulation of international family planning policy.

III. HUMAN RIGHTS ADVANCED

This part focuses on the possible impact of the hybrid formulation on three significant human rights,[90] first describing the right and then discussing the ways in which it would be affected by the approach described in the preceding section. The three rights considered are: the right of reproductive choice for women; women's right to equality; and the right to health and an adequate standard of living. The first right is grounded most firmly in the U.S. constitution, the second is reflected in both U.S. constitutional and international jurisprudence and the third is found only in the international instruments. Analyzing these specific rights, accordingly, should enable us to consider the interplay of the domestic and international standards along a continuum, providing some perspective on the extent to which the hybrid formulation would both further and compromise the two conceptions of rights. Ideally, by addressing the needs and concerns of recipient states, family planning assistance could generate international goodwill as well as furthering the specific rights addressed. By fostering mutual respect between nations, such aid could contribute to an international environment more conducive to the exercise of all human rights.[91] This kind of productive relationship may be particularly difficult to cultivate in this context because of the clash between Western and Third World views as to the position of women in society.[92]

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88. Art. 5(a), *Women's Convention*, *supra* note 35.

89. One possible response might be to decline to fund genetic screening for sex, except where justified by a suspected sex-linked defect. In China, for example, a procedure was developed for determining the sex of the fetus at seven weeks. The procedure was discontinued after twenty-nine of the first thirty women who chose to have abortions aborted female fetuses. Hartmann, *supra* note 18, at 247. Similarly problematic, information about the fetus' sex could be withheld.

90. For discussions of addditional rights which would be advanced by revocation of the MCP, see Coliver & Newman, *supra* note 36, at 82 (right to receive and impart abortion information); *id.* at 124 (discrimination against children). *See generally* Eisler, *supra* note 46.

91. *See* Eisler, *supra* note 46.

92. Indeed, this may become an imbroglio because of Third World distrust of Western motives. During the 1970's, the population policy of the U.S. was decried by many states in the Third World as "genocide." Ironically, some of the same Third World countries subsequently adopted even more stringent methods of population control. Moreover, American renunciation of its family planning policy, as set forth in the MCP, was for the most part

As suggested below, the generally higher status of women in the West[93] may be attributed in part to the degree of reproductive choice which they already enjoy.

This part is divided into two sections. The first considers civil and political rights and the second focuses on economic and social rights.[94]

A. *Civil and Political Rights*

1. Reproductive choice

The first civil right furthered by the hybrid formulation would be the right to reproductive choice. While this right is firmly established in American jurisprudence, its place in international law is more ambiguous. The Civil Covenant provides that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home,"[95] and, "[e]veryone has the right to the protection of the law against such interference or attacks."[96] Furthermore, "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."[97] There is neither a right to abortion nor a prohibition against it under international law.[98] But at least in those states which recognize a woman's right to choose whether or not to terminate a pregnancy, it should not be abrogated solely because a state lacks the resources to implement it if U.S. family planning assistance is available.

In considering how this right would be affected by the hybrid formulation, I will address two questions. First, what difference does it make whether reproductive choice is considered a right or a policy? Second, assuming it is a right, whose right is it?

a. Reproductive choice — right or policy?

It is far more advantageous for women seeking to exercise reproductive choice if such choice is protected as a right, especially a "fundamental" right under the U.S. constitution, rather than provided as a matter of public policy. First, state curtailment of a fundamental right is rigorously scrutinized. Under the hybrid proposal here, this would mean that the

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opposed by Third World delegates at the Mexico City conference. *See supra* note 19.

93. *See infra* text accompanying notes 89-95. *See generally* WOMEN IN THE WORLD 1975-1985: THE WOMEN'S DECADE (L. Iglitzion & R. Ross, 2d ed. 1986).

94. This reflects the respective concerns of the Civil and the Economic Covenants, although the division is not precise here and other international instruments will also be discussed.

95. Art. 17.1, *accord* Art. 16, Universal Declaration of Human Rights, G.A. Res. 217 (III 1948).

96. Art. 17.2, *Civil Convention*, *supra* note 35.

97. Art. 23.2, *Civil Convention*, *supra* note 35.

98. Coliver & Newman, *supra* note 36, at 83. *But see* notes 44-48, *supra* (citing, *inter alia*, American Convention on Human Rights, Art. IV., 1. which provides in pertinent part, "Every person has the right to have his life respected. This shall be protected by law and, in general, from the moment of conception.").

U.S. would be foreclosed from independently imposing any restraints on the right unless it demonstrated a compelling interest in doing so, and was unable to further that interest by less restrictive means. Restraints imposed under local law that did not satisfy this standard[99] would adversely affect the program's evaluation leading to reduced funding, contingent funding or actual termination.

U.S. supported family planning programs would accordingly stress that enhancement of the recipient's own decision-making capacity is the first priority of family planning efforts. This requires that the couple be fully informed as to the options available and their possible consequences. The state's interest in population control is "trumped" by the individual's right[100] and cannot justify its abrogation. Under a rights analysis, accordingly, population control policies that infringe on the individual's right to reproductive choice could lead to the loss of U.S. support for programs implementing such policies. This does not mean that local programs incorporating population goals would necessarily run afoul of the U.S. constitution. But unless public welfare concerns were "compelling," and could not be advanced by any "less restrictive means," U.S. funding could be withdrawn.[101]

In addition to program evaluation, recognition of reproductive choice as a right makes it more secure. If abortion is merely considered a policy preference, for example, women's access to abortion is likely to be contingent upon the changing priorities of external, usually male, decision-makers. Moreover, any derogation of reproductive choice legitimizes encroachment of the right. Abortion-based restrictions are likely to undermine a far broader range of family planning programs, just as the Helms Amendment, although limited in terms of its initial impact, provided a basis for the MCP's later sweeping attack against family planning. The Helms Amendment should be repealed more because of its role in the erosion of reproductive choice than because of its direct, relatively insignificant, consequences. As Hartmann has observed, banning abortion is merely the first step in the political agenda of the anti-family planning forces.[102]

b. Whose right is it?

Where the couple disagrees on reproductive choice, the final decision

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99. *See generally, And the Poor Get Sterilized*, THE NATION, June 30, 1984, at 798-99; Bishop, *Officials Debate Asylum for Chinese Fleeing Abortion Policy*, N.Y. Times, Apr. 3, 1989, at A13, col.1.

100. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

101. *But cf. Webster*, 106 L.Ed. 2d, at 437 (declining to "unnecessarily attempt[] to elaborate the abstract differences between a fundamental right to abortion . . . a 'limited fundamental constitutional right' . . . or a liberty interest protected by the Due Process Clause, which we believe it to be.") If abortion were held to involve merely a liberty interest, the 'strict scrutiny test' set forth in the text would not apply.

102. *See* B. HARTMANN, *supra* note 18, at 244, 293. *See generally* Cook & Maine, *Spousal Veto Over Family Planning Services*, 77 AM. J. PUB. HEALTH, 339 (1987).

must be the woman's since she is the one who will be pregnant and give birth.[103] As Hartmann has noted, however, this is rarely feasible in the Third World. The husband customarily controls the family's money and land, expects sons from his wife, and is likely to regard with hostility any innovation which reduces her dependence on him, particularly if it increases her sexual freedom — and his anxiety about her fidelity.[104] Planning services that exclude the husband in order to encourage the wife's independence simply leave the wife in the untenable position of convincing a suspicious husband of the benefits of birth control. Without support, from the program or her community, her efforts are likely to be futile and she may even risk physical abuse.

Some family planning services have attempted to involve the husband in the process and to educate him as to the benefits of contraception, for the family as well as the wife.[105] Although reproductive choice is the woman's right in theory, in practice she may not be able to exercise it without the consent and cooperation of her spouse. There is no technical violation of a rights' approach, however, as long as there is no legal impediment to the woman's exercise of the right. While it is unlikely that the husband's domination will be significantly undermined merely by explaining to the couple that the right is generally the woman's, such explanations may contribute to a changing perception of women's roles. Recognizing that the right is ultimately the woman's has other practical consequences; among them that no family planning program could require her to obtain spousal consent for contraception, including abortion, even if social pressure compels her to do so.

2. Reproductive choice as a prerequisite for equality and autonomy

It has been suggested that control over the body should be considered the first form of autonomy.[106] Feminists have argued, moreover, that in the reproductive context it is the necessary condition of all later forms. As Elizabeth Moen notes, "[t]he control of fertility by women as *individuals* is necessary for full and equal opportunity in society."[107] The critical

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103. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) ("Clearly since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period."). Dixon-Mueller, *U.S. International Population Policy and 'The Woman Question,'* 20 N.Y.U. J. INT'L L. & POL. 143, 167 (1987); *see generally Symposium: Women and International Human Rights*, 3 HUM. RTS. Q. 1 (1981); Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978). *But cf. Where Abortion Laws Stand Now, State by State*, *supra* note 69 (Montana, Utah and Florida have laws requiring that husbands be notified).

104. *See* B. HARTMANN, *supra* note 18, at 48.

105. *See, e.g.*, 1987 ANNUAL REPORT: IPPF/WHR 27-28 (describing contraception education program for Mexican men in "security institutions").

106. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

107. Moen, *Women's Rights and Reproductive Freedom*, 3 HUM. RTS. Q. 53, 59 (1981); *accord* L. GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN

question here is whether reproductive choice empowers women where political, economic and social constraints not only remain in place, but are so pervasive as to call into question even the possibility of "choice."[108]

Even under such circumstances, a modicum of reproductive choice offers women the possibility of incremental change in their lives. Control over reproductive capacity is essential, if not sufficient, not only for equality but for any kind of transformation in women's role in the family and society in the Third World.[109] The experience of controlling her own fertility is directly and concretely empowering. Only if she can be free of pregnancy, nursing, and infant care long enough to regain her strength and consider her own needs, can a woman begin to question the political and social forces that circumscribe her life.[110]

B. *Social and Economic Rights*

1. Health

The Economic Covenant assures the right to health: "The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[111] The Women's Convention is more specific:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning . . . "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . .(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."[112]

The availability of contraception can improve health in three impor-

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AMERICA 394 (1976).

108. *See supra* text accompanying notes 92-93, 104.

109. "The question of reproductive choice ultimately goes far beyond the bounds of family planning programs, involving women's role in the family and society at large. Control over reproduction is predicated on women having greater control over their economic and social lives and sharing power equally with men." B. HARTMANN, *supra* note 18, at 34.

110. Indeed, it has been suggested that this is precisely why reproductive choice has been so adamantly opposed by those embracing and incorporating patriarchal norms, including the Catholic Church. *See generally* Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980). *See also* Benshoof, *supra* note 20.

111. Art. 12.1, *Economic Convention*, *supra* note 35.

112. Art. 16.1; *accord Universal Declaration*, Art. 19. *See* Fraser, *Women and International Law*, 11 HARV. WOMEN'S L.J. 171, 174 (1988) (noting that more reservations to the Convention have been made on Art. 16 than on any other article and attributing this to conflict between "strong cultural norms" and the article's mandate). *See generally* Byrnes, *supra* note 35, at 51-56 (discussing problem of reservations to the Women's Convention).

tant ways. First, it can decrease maternal mortality rates,[113] because it permits women to regain strength between pregnancies,[114] to limit pregnancies[115] and to avoid particularly dangerous pregnancies.[116] Second, it benefits infants, who have higher birth weights and receive better care when there is longer spacing between children. As Dixon-Mueller has pointed out, mortality rates for children between one and two years old are as much as four times higher when there is another birth within eighteen months.[117] Third, contraception prevents death from illegal abortions. Illegal abortions in the Third World represent a leading cause of death among women of childbearing age,[118] demonstrating the urgent need for the repeal of the Helms Amendment and the MCP in order to safeguard women's right to health.[119]

The effect of family planning programs on health has not all been positive, however.[120] Even where contraception is freely chosen, it may have adverse effects on health. First, as our own experience has shown, IUDs and birth control pills are not without significant health risks. Absent adequate education and support personnel, these risks are likely to be compounded by ignorance as to proper use. Additional risks, including abrupt termination of supplies, instruction, and follow-up care, may result from reliance on funding sources subject to political whim. As discussed above, family planning services require an ongoing commitment.

These ill-effects are not inevitable results of family planning. Rather, they are problems resulting from poor administration or the inappropriate priorities of such programs. Health problems are especially prevalent in programs giving demographic goals precedence over individual rights, for example. Thus, the "failures" of family planning, from a health perspective, strengthen arguments for both an adequate level of funding and the need for an emphasis on the human rights consequences of the ser-

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113. Mortality rates in excess of 500 per 100,000 live births are common in the Third World, compared to five to 30 per 100,000 in the west. B. HARTMANN, *supra* note 18, at 46; *see also* Dixon-Mueller, *supra* note 103, at 115. *See generally* Cook, *Reducing Maternal Mortality: A Priority for Human Rights Law*, in LEGAL ISSUES IN HUMAN REPRODUCTION 185 (1989).

114. *See* Cook & Dickens, *International Developments in Abortion Laws: 1977-78*, AMER. J. PUB. HEALTH 1305, 1309 (1988) (noting that "epidemiological evidence shows that sound child spacing assisted by availability of abortion contributed positively to reduction of maternal . . . mortality.").

115. Dixon-Mueller, *supra* note 103, at 109.

116. *Id.* at 108.

117. *Id.* at 112-13. *See also* Cook & Dickens, *supra* note 114, at 1309.

118. Rosenfeld, *Abortion: The Neglected Problem*, 15 PEOPLE 4 (1988) (an estimated 30-40% of 500,000 pregnancy related deaths (150,000-200,000) are attributable to complications of illegal abortions; citing survey of 60 developing countries in late 1970's, estimating 70,000-100,000 maternal deaths annually from complications of abortion).

119. As many commentators have noted, women have abortions whether or not they are legal. The difference is in the cost and the quality of care they receive. *See, e.g.*, R. REPETTO, *supra* note 5, at 50; B. HARTMANN, *supra* note 18, at 47; Rosenfeld, *supra* note 118.

120. For a detailed description of the ill-effects of contraception, and their abuses by population planners in the Third World, *see* B. HARTMANN, *supra* note 18, at 176-207.

vices provided.

2. Adequate Standard of Living

In addition to health factors, the Economic Covenant assures a right to an adequate standard of living: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing . . . ."[121] The Economic Covenant further recognizes "the fundamental right of everyone to be free from hunger."[122] While these provisions have been used to support arguments for the redistribution of resources,[123] it is equally clear that under the Economic Covenant the economic consequences of a growing population[124] must be taken into account.[125]

As Camp has pointed out, the harm to family planning caused by the MCP was not so much loss of support, but the loss of support by specific countries that had spiraling populations. By rescinding those policies, accordingly, the U.S. would be able to reestablish family planning efforts in countries such as India, which "adds more people to the world population than any other country . . . more than all of sub-Saharan Africa combined."[126]

While national fertility levels reflect aggregate decision-making about population, individual reproductive choice has been shown to be a significant factor. Decisions about reproduction are a function of more than the availability of contraception or abortion, of course,[127] but the unavailability of birth control is often pre-emptive. Control over reproduction is one of the major determinants of the individual family's standard of living. Such control, accordingly, is necessary if the family is to provide a "life with dignity" for its members.[128]

CONCLUSION

By renouncing the MCP and repealing the Helms amendment, and

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121. Art. 11.1, *Economic Convention*, *supra* note 35.

122. Art. 11.2, *Economic Convention*, *supra* note 35.

123. *See generally* Barry, *Humanity and Justice in Global Perspective*, in ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV (J. Chapman & J. Pennock eds. 1982).

124. While global population is steadily growing, the rate of population growth is no longer increasing. Repetto, *Population, Resource Pressures and Poverty*, 131, 133, in THE GLOBAL POSSIBLE: RESOURCES, DEVELOPMENT AND THE NEW CENTURY (R. Repetto ed. 1985). This has not reassured proponents of the "population explosion" view. *See, e.g.*, Gore, *An Ecological Kristallnacht. Listen*, N.Y. Times, Mar. 19, 1989, Op-Ed, § 4, at E27, col.1.

125. For an analysis of the relation between redistribution of resources and population control, see Ratcliffe, *supra* note 4.

126. Camp, *supra* note 16, at 45.

127. *See* Ratcliffe, *supra* note 4, at 279.

128. Dominguez, *Assessing Human Rights Conditions*, in ENFORCING GLOBAL HUMAN RIGHTS (1979); *see generally* Nielsen, *On the Need to Politicize Political Morality: World Hunger and Moral Obligation*, in ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV (J. Chapman & J. Pennock eds. 1982).

applying constitutional and internationally recognized human rights standards to its international family planning policy, the U.S. could substantially further international human rights. It would at least increase the possibility of reproductive choice for women currently without options. While such choice cannot assure equality, it is a prerequisite. Thus, revision of our family planning policy would potentially empower women. It would promote the right to health recognized under the Economic Covenant, especially, but not exclusively, for women and children. It would enable millions to take a critical first step toward an "adequate standard of living." Finally, by demonstrating respect for the concerns and priorities of the rest of the world, particularly Third World women, adoption of the family planning policy considered above would represent a fundamental and long overdue shift in the U.S. approach to international human rights.

This is the inaugural issue for a new section in the *Denver Journal of International Law & Policy*. The International Capital Markets Section will be a part of each issue of the *Journal* and will focus on international capital markets and international securities issues. The *Journal* is honored that Harold S. Bloomenthal will be advising the Section's Executive Committee.

INTERNATIONAL CAPITAL MARKETS SECTION

The SEC And Internationalization Of Capital Markets: Herein Of Regulation S And Rule 144A

HAROLD S. BLOOMENTHAL*

§1 REGULATION S AND RELATED INITIATIVES

The Securities and Exchange Commission has made "achieving a truly global market system" a top priority.[1] The Commission's focus on international securities markets led it to revisit a number of its own practices which may have impeded the efficiency of those markets.[2] Commission policy in this area for over two decades was largely determined by mid-level staff through the no action letter process. These policies failed to take into account the increasing institutionalization of markets in general and international capital markets in particular. The overall effect of such policies was to make it difficult and costly for U.S. institutional investors to purchase foreign securities. The extraterritorial application of

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1. *See* press release relating to SEC, "Policy Statement on Regulation of International Securities Markets" (November 14, 1988 Press Release).

2. The relevant releases are as follows: Securities Act Release No. 6838 [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,426 (July 11,1989) reproposing Regulation S (hereinafter the "Reproposing Release"); Securities Act Release No. 6779 [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,242 (June 10, 1988), proposing Regulation S (hereinafter the "Proposing Release"); Securities Act Release No. 6839 [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,427 (July 11, 1989), reproposing Rule 144A (hereinafter the "Rule 144A Reproposing Release"); Securities Act Release No. 6806 [1988-89 Transfer Binder] Fed. Sec. Law Rep. (CCH) ¶84,335 (Oct. 25, 1988), proposing Rule 144A (hereinafter the "Rule 144A Proposing Release"); Securities Exchange Act Release No. 27017 [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,428 (July 11, 1989), adopting Rule 15a-6 relating to the registration of foreign securities dealers (hereinafter the "Rule 15a-6 Release"); Securities Act Release No. 6841 [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,432 (July 24, 1989), relating to multi-jurisdictional disclosure (hereinafter the "Multi-Jurisdictional Disclosure Release").

the registration provisions of the Securities Act kept U.S. investors from purchasing securities of foreign issuers distributed outside of the United States. Foreign issuers for the most part were unwilling to offer their securities in the United States because of unwillingness (or inability) to comply with SEC registration requirements and accounting principles and fear of the potential "in terrorem" liabilities under Section 11 of the Securities Act for false or misleading statements in a registration statement. U.S. institutional investors, increasingly interested in the global diversification of their portfolios, were forced to buy foreign securities, if at all, in the secondary markets, often at premium prices above the original offering price. The broker-dealer registration provisions under the Exchange Act[3] also made it difficult for foreign securities firms to transact business in the secondary markets with prospective U.S. institutional investors.

The new focus of an energized staff has resulted in a plethora of proposals and reproposals, some aspects of which are controversial and most of which have not yet been adopted. The composition of the Commission is in transition, and although the new Commission is likely to favor the liberalization represented by the proposals, there may be additional delays and some changes as the new Commissioners familiarize themselves with the proposals and the new Chairman assumes a leadership role. The proposals include the following:

1. The centerpiece is proposed Regulation S regulating offshore distributions by U.S. and foreign issuers. Regulation S removes the threat of the long reach of the Securities Act registration provisions from most offshore distributions of straight debt securities by foreign issuers and from some offshore distributions of equity securities of foreign issuers, permitting U.S. investors to purchase them provided the transaction takes place offshore and there is no directed selling effort in the United States.[4] Regulation S also includes safe harbors for offshore distributions by U.S. issuers which liberalize the restrictions that the issuer was obligated to adopt under the no-action letter policies to prevent flowback of the securities to the United States. Regulation S also allows U.S. institutions to invest in any offshore offering by forming a non-U.S. subsidiary based offshore for the specific purpose of purchasing such securities[5] or by giving a foreign investment adviser discretion to purchase such securities for its account.[6]

2. Proposed Rule 144A is intended to provide an efficient, liquid market among large (portfolios with a cost basis of excess of $100 million) institutional investors for securities issued in exempt offerings (including Regulation S offshore distributions for this purpose as an exempt offer-

3. Securities Exchange Act, §15(a).
4. *See* §6[c] *infra.*
5. *See infra* note 77.
6. *See infra* note 85.

ing). Rule 144A has broad implications for exempt offerings by U.S. issuers in the United States, but will also operate in tandem with Regulation S in a number of important respects. The scenarios that will develop remain to be played out, but the opportunities are numerous including a private tranche of a Regulation S offering being made concurrently in the U.S. to qualified institutional investors. Although the private tranche will have to find an appropriate exemption from Section 5, the sale of securities in a closed system open only to Rule 144A purchasers makes it likely that such an exemption will be available. Rule 144A also enhances the liquidity for privately placed securities (and, hence, the attractiveness of the offering) and Rule 906 of Regulation S also provides an exit from the private market assuming that the securities are traded in an organized foreign securities market.[7] Rule 144A also provides liquidity (and an opportunity for qualified institutional investors to purchase) securities distributed offshore pursuant to Regulation S as the foreign purchaser could resell such securities during the Regulation S restricted period to a qualified institutional investor in reliance on Rule 144A. The Commission concurrently proposed to amend Rule 144(d)(1) so as to permit successive purchasers in a series of private transactions to tack the holding period of their predecessors back to the first purchase from the issuer (or an affiliate of the issuer).

The National Association of Securities Dealers (NASD) submitted a proposal to the Commission under which it would operate PORTAL, a screen based market limited to qualified institutional investors as defined by Rule 144A for both initial private placements and subsequent trading among qualified institutional investors.[8] The existence of such a market could increase significantly the liquidity of securities traded and may reduce or eliminate discounts incurred in the secondary market for restricted securities. PORTAL could also serve as a policing device to assure compliance with Rule 144A and to police the exit of the security from that market in compliance with applicable law. The promise of PORTAL is a more efficient and liquid secondary market in privately placed securities.[9] The American Stock Exchange is considering a similar closed market, SITUS, which would be limited to securities of foreign is-

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7. *See* §7[b] *infra*.

8. The NASD submitted a revised proposal to the Commission on November 3, 1989 for approval of PORTAL, an acronym for Private Offerings, Resales and Trading through Automated Linkage. The proposal, if approved, will become Schedule I to the NASD By-Laws. *See* Securities Exchange Act Release No. 27470, 54 Fed. Reg. 49164 (Nov. 29, 1989).

9. The NASD expects to have the system up and operating shortly after the adoption of Rule 144A and its proposal is subject to the adoption of Rule 144A. The system can be accessed only by qualified institutional investors (including securities dealers that qualify) and by securities dealers acting as brokers that meet minimum capital requirements established by the NASD and register as participants with the NASD. Access to the primary market will be by a personal computer and a modem; eventually, continuous access to the secondary market will be provided for participants in the system. *See* Wall Street Letter, Nov. 13, 1989, at 6 and Sept. 11, 1989, at 4. PORTAL is discussed further at §8[g].

suers.[10] A screen based market for privately placed securities could revolutionize the manner and extent to which such securities are traded and seems essential if Rule 144A is to live up to its promise.

3. The Commission proposed and adopted Rule 15a-6 providing a very limited exemption from the broker-dealer registration provisions for foreign broker-dealers transacting business with U.S. institutional investors. The Rule attempts to establish a territorial principle for the regulation of broker-dealers—broker-dealers confining their securities business offshore do not have to register with the SEC, whereas those conducting business in the United States do.[11] If, however, a foreign dealer chooses to conduct its U.S. business through a registered U.S. affiliate, as many of them do, such registration does not extend to the activities of personnel of their parent located outside of the United States. The parent would have to register with the Commission in order to conduct business directly in the United States.[12] In addition, a broker-dealer operating offshore, but soliciting transactions from U.S. investors in the United States by phone or otherwise is subject to the broker-dealer registration provisions. Rule 15a-6 is a very limited conditional exemption from this general scheme. A foreign broker-dealer may furnish research reports to major U.S. institutional investors under limited and restricted circumstances. The Rule also permits the direct solicitation of major and other institutional investors provided the transaction is effected through a registered U.S. dealer.[13] Such transactions, however, are subject to a number of restrictions which include, for institutional investors that are not in the major category, the participation of an associated person of a U.S. registered dealer in all oral conversations with the institutional investor.[14] A major institutional investor is one that has total assets of $100 million or more.[15] The Rule also permits a foreign broker-dealer to effect transactions with and solicit a registered broker or dealer, whether such registered broker-dealer is acting as principal or as agent, or a bank acting as a broker-dealer.[16] The restrictions and conditions of Rule 15a-6 are so numerous and onerous it is unlikely that they will dramatically affect the manner in which foreign broker-dealers sell securities to U.S. inves-

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10. *See* Reproposing Release, *supra* note 2, at 80, 229 n. 42.

11. *See* Rule 15a-6 Release, *supra* note 2, at 80,237.

12. *Id.* As of 1987, there were 179 registered broker-dealers which were affiliated with foreign broker-dealers or foreign banks. *Id.* at 80,233. Foreign broker-dealers avoid registering the parent, as in that event the parent would have to become a member of the National Association of Securities Dealers and its personnel would have to meet the various requirements of the NASD for principals and registered representatives. The Commission, however, raises no objection to personnel who are subject to the supervision of the registered U.S. affiliate and have met the NASD (and/or other SRO) requirements from soliciting U.S. transactions while based at the office of the parent if the transactions are executed by the registered affiliate. *Id.* at 80,238.

13. Rule 15a-6(a)(2)-(4).

14. Rule 15a-6(a)(3)(iii)(B).

15. Rule 15a-6(4)

16. Rule 15a-6(a)(4).

tors or the manner in which U.S. institutional investors access the market for foreign securities. The Commission also issued a concept release which envisions the ultimate acceptance of home country regulation of broker-dealers based on common standards which would permit securities dealers to operate cross-borders subject primarily to regulation of the home state.[17] Such a proposal would require legislation and at the moment is only a concept.

4. The Commission has also proposed rules and forms relating to offerings by certain Canadian issuers in the United States reflecting an understanding with the Ontario and Quebec securities commissioners who have proposed counterpart procedures for U.S. issuers in their respective provinces. The resulting regimen could become the prototype for multinational offerings involving other jurisdictions with advanced disclosure systems. The civil liability provisions of the U.S. securities laws would remain applicable. The Commission's proposed rules and forms include the following:[18]

(a) A Form F-9 to be used by substantial Canadian issuers for offerings of investment grade non-convertible debt securities or non-convertible preferred stock. A substantial issuer eligible to use this form must have a total common stock market capitalization of at least (CN) $180 million and a public float of (CN) $75 million. The issuer would prepare disclosure documents in accordance with Canadian requirements and the review of those documents would be by Canadian authorities which would determine when the registration statement would become effective. A wraparound of the Canadian prospectus together with exhibits and copies of documents incorporated by reference would be filed as the Form F-9, and which would be given a "no review" status in all but exceptional situations. A Form F-X would also be filed which would include a consent to service of process, appointment of a U.S. person as agent for process, a consent to service of an administrative subpoena, and an undertaking to assist the SEC with administrative investigations. The disclosure documents used in the United States would be the Canadian disclosure documents which, however, would have to include statements warning that the investment could have tax consequences in the issuer's jurisdiction, that difficulties may be encountered in pursuing remedies for securities law violations against persons and assets located outside the United States, and that the financial statements were prepared in accordance with Canadian accounting standards.

(b) Form F-10 would be available for offerings by substantial issuers of securities other than investment grade debt or preferred stock. A substantial issuer eligible to use this form, however, must have a common stock market capitalization of at least (CN) $360 million and a public

17. Securities Exchange Act Release No. 27,018 [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,429 (July 11, 1989).

18. *See* Multi-Jurisdictional Disclosure Release, *supra* note 2.

float of (CN) $75 million. The registration and disclosure procedures would be the same as in a Form F-9 offering except there would have to be a reconciliation of financial statements to U.S. GAAP which requires, among other things, the segmental information and supplemental oil and gas data specified by Regulation S-X.

(c) Form F-7 would be available for rights offerings by certain Canadian issuers provided U.S. residents held of record less than twenty percent of the class of stock to which the offering pertained. To be eligible to use Form F-7, the Canadian issuer must have had a class of securities listed on the Toronto or Montreal Stock Exchange for the immediately preceding thirty-six months. The procedures would be substantially the same as those outlined in connection with Form F-9.

(d) Form F-8 would be used to register exchange offers by a Canadian issuer for a Canadian target if less than twenty percent of the securities of the target class are held of record by residents of the United States. To be eligible to use Form F-8, the Canadian issuer would have to have a common stock market capitalization of not less than (CN) $75 million and have had a class of securities listed on the Toronto or the Montreal Stock Exchange for the immediately preceding thirty-six months. The Canadian issuer would file the offering materials required under Canadian law with the SEC on Form F-8 accompanied by the Form F-X and the registration statement would become effective on filing with the Commission. Compliance with the tender offer regulations applicable in Canada would be deemed compliance with the Williams Act.

(e) The proposed regimen would also extend to tender offers for Canadian issuers which are Canadian reporting companies if less than twenty percent of the target's securities for which the bid is made are held of record by U.S. residents. In the case of a cash tender offer, the appropriate Canadian offering materials would be filed with the SEC under wraparound Schedules 14D1-F (for third party tender offers); Schedule 13E-4F (for issuer tender offers), and Schedule 14D9-F (for the target's response). Compliance with applicable Canadian requirements would be deemed compliance with the Williams Act provided the foregoing forms are filed with the SEC to the extent applicable and provided the tender offer is extended to all holders of the class of securities in the United States.

Regulation S and Rule 144A together promise to significantly change and liberalize offshore distributions and the access of U.S. institutional investors to foreign securities. Proposed Regulation S suffers from a number of ambiguities, necessitating a careful scrutiny of the Proposing and Reproposing Releases in an effort to clarify the nuances. Specifically, Regulation S does not say, except by implication, that a foreign purchaser who acquires the security sold in reliance on Regulation S can, after the end of the restricted period, sell the security to a U.S. person or in the

U.S.[19] The distinction between debt and equity securities is important in a number of contexts under Regulation S, but the Regulation does not make it clear whether convertible debentures are debt or equity securities, or both.[20] Regulation S also fails to provide that debt securities of a subsidiary guaranteed by a reporting company are to be treated as securities issued by a reporting company. The result will be to discourage the use of subsidiaries for offshore financing. Proposed Rule 144A and proposed amendments to Rule 144(d)(1) impose discriminatory non-national treatment in certain respects with respect to securities of non-reporting foreign issuers.[21] Clarification is needed in other areas as well.

The foregoing comments should not detract from the major contribution the adoption of Regulation S and Rule 144A will make to international capital markets. There undoubtedly will be some modifications in Regulation S and Rule 144A as adopted, reflecting the comments of the commenters and the views of the new Commissioners. Hopefully, not too much additional time will be spent attempting to fine tune the proposed rules in an effort to get it right the first time. Experience under the Regulation and Rule will provide ample opportunity for problems to surface which can be handled by amendments and/or interpretative releases, much as in the case of Rule 144. The complexity of the area and transactions that will be governed by Regulation S and Rule 144A is such that it is likely that the interpretative function will be an ongoing one for several years as the market reacts with different types of securities and marketing mechanisms.

The impetus for Regulation S and Rule 144A may have been to improve the access of institutional investors to securities distributed offshore, but from the standpoint of a securities practitioner it has tremendous importance for issuers distributing securities outside of the United States. The primary focus of this article is the application of the U.S. securities laws to offshore distributions. A U.S. issuer distributing securities offshore must deal with securities regulation in the countries in which it proposes to make the distribution; foreign securities regulation is discussed briefly, primarily to assure that it is not overlooked. The approach of this Article beyond that is two-fold: First, it takes a linear and long look in Part I at the regulatory scheme embraced in Regulation S and Rule 144A, viewing it in broad outline. Secondly, in Part II, it takes a cross-section look viewing separately the application of that scheme to discrete offshore distributions, and hybrid offshore-onshore distributions.

§2 FOREIGN SECURITIES REGULATION

Securities regulation in some form now exists in many countries with

19. *See* §7[c] *infra.*
20. *See* §9 *infra.*
21. *See* §8[d]-[e] *infra.*

free-market economies. In France,[22] Japan,[23] Italy,[24] Australia,[25] and Mexico[26] there are national commissions or bureaus which to a degree are a counterpart of the SEC. In Canada,[27] there are provincial commissioners who function very much like state blue-sky commissioners in the United States. Australia created a National Companies and Securities Commission, but to avoid constitutional questions the federal government adopted three principal laws relating to securities and corporations and each of the Australian states then adopted laws identical to the federal laws, administered in conjunction with the federal regulation.[28] In 1989, Australia adopted a Commonwealth Corporations Act creating the Australian Securities Commission which supplants the federal-state coordinated system of regulation with a federal system.[29] In the United Kingdom, the Financial Services Act of 1986 established a unique blend of securities regulation emphasizing the role of the Self-Regulatory Organizations, but supervised and monitored by the Securities and Investment Board, which is a government agency in all but name and legal formalities.[30] Hong Kong has a Securities Ordinance which establishes a Securities Commission, provides for a Securities Commissioner and an extensive system of securities regulation[31] which is being replaced by a new scheme because of its inability to cope with the October 1987 stock market collapse.[32] In other countries, including Germany,[33] the Netherlands,[34] Belgium,[35] and Luxembourg,[36] the stock exchanges are the principal

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22. *See* G. Miller, *Securities Regulation in France*, in INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION (H. Bloomenthal ed.) (hereinafter "ICMSR"), at ch. 7.

23. *See* M. Tatsuta, *Securities Regulation in Japan*, in ICMSR, at ch. 11.

24. *See* ICMSR, at 1-60.

25. *See* J.P. Hambrook, *Securities Regulation in Australia*, in ICMSR, at ch. 10.

26. *See* ICMSR, at 1-67.

27. *See* J. Cowan, *Securities Regulation in Canada*, in ICMSR, at ch. 4.

28. *See* Hambrook, *supra* note 4, at §10.01.

29. *See* 2 International Securities Regulation Rep. (BNA), at 2-3 (Nov. 8, 1989). The Act is being challenged on constitutional grounds and the issue is expected to be resolved by the High Court during early 1990. *Id.*

30. *See* H. Bloomenthal, *United Kingdom—Financial Services Act*, in ICMSR, at ch. 6A.

31. *See* T. Rogers, *Securities Regulation in Hong Kong*, in ICMSR, at ch. 12.

32. *See* ICMSR, at 1-64.

33. *See* E. Röhm, *Securities Regulation in Germany*, in ICMSR, at ch. 8C.

34. *See* J. Schaafsma, *Securities Regulation in the Netherlands*, in ICMSR, at ch. 8. In February of 1989, the Securities Board of the Netherlands, a self-regulatory organization modeled loosely after the scheme of regulation in effect in the United Kingdom, assumed responsibility for supervising the stock exchanges, the over-the-counter market, and Dutch laws impacting securities generally. The board has the power to advise, to adopt binding interpretations and to persuade, but not the power to impose sanctions. *See* Raun, *Start By Dutch Watchdog*, Fin. Times, February 1, 1989, at 33.

35. *See* E. Wymeersch, *Securities Regulation in Belgium*, in ICMSR, at ch. 8A. In Belgium, an issuer publicly offering securities has to file a prospectus with the Banking Commission. *Id.* at §8A.05.

36. *See* E. Wymeersch, *Securities Regulation in Luxembourg*, in ICMSR, at ch. 8B. In Luxembourg, an issuer must register securities with the Institute Monetaire before securi-

source of securities regulation, and in all countries with stock exchanges, such exchanges play a role as a self-regulatory agency which often extends beyond that played by American stock exchanges.

To the extent securities regulation exist outside the United States, emphasis is placed on disclosure in connection with public offerings, stock exchange listings and annual and semi-annual reports to shareholders.[37] There is also a significant consensus as to the need for regulation of investment companies,[38] securities dealers,[39] insider trading,[40] and, to a lesser degree, takeovers.[41] There is little regulation of proxy solicitation outside the United States and Canada.[42] There is obviously considerable variation in the content of regulation and the means of enforcement with only the United States placing considerable reliance on private remedies, although the United Kingdom, in particular, has in place civil remedies that might become the basis for effective enforcement through private actions.[43] In the disclosure area, the European Economic Community has

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ties can be offered publicly. *Id.*

37. *See* ICMSR, at §1.08[2]-[3]. In the European Community, the directives relating to prospectus disclosure requirer ents (which are presently confined to securities to be listed upon completion of a public offering and to listing applications) will become all pervasive under a directive relating to the distribution of a prospectus when transferable securities are offered to the public. Directive No. 89/298, O.J. 1989 L124/8; Common Mkt Rep. (CCH) ¶1751. Member states must adopt conforming legislation by April 17, 1991.

38. *See* ICMSR at §1.09.

39. *Id.* at §1.04. The European Community is moving toward a single financial services market by the end of 1992 based on the principle that an entity authorized to conduct various aspects of the investment business in its home state can operate in any member state. The basis for this scheme of regulation can be found in the proposed Second Banking Coordination Directive, the proposed Investment Services Directive, and other related directives. *See generally* Buchan, *EC Drafts Free Market Securities Directive,* Fin. Times, Dec. 15, 1988. The Second Banking Directive proposed by the Commission in December of 1988 (O.J. 1988 C84/1; Common Mkt. Rep. (CCH) ¶95,028) was revised by the Commission in April of 1989 (Common Mkt. Rep. (CCH) ¶95,113) and must be approved by the Council and EC Parliament. The investment services proposal ((COM(88) 778); Common Mkt. Rep. (CCH) ¶95,028) also requires the approval of the Council and Parliament.

40. *See* ICMSR, at §1.08[5].

41. *Id.* at §1.08[6]. Such regulation will become pervasive if the Thirteenth Company Law Directive on Take-over and Other General Bids becomes effective. The Directive was approved by the Commission (O.J. 1989 C64/8; Common Mkt. Rep. (CCH) ¶60,200) but must complete the EC's legislative process.

42. *Id.* at §1.08[7].

43. The Financial Services Act ("FSA") provides that a purchaser of a security can bring an action based on a false or misleading statement in a prospectus or listing particulars. FSA §§150, 166. The FSA also provides that any person injured as the result of a violation by a member of any rule of a self-regulatory organization can bring a private action against such member. FSA §62(2). The lack of a class action counterpart in the U.K. and other countries probably plays a role in the reluctance of private parties to initiate litigation. The U.K. courts have been innovative in allowing master pleadings to facilitate actions by multiple plaintiffs with similar claims, selecting lead cases to resolve issues common to such claims, and providing for sharing of costs among multiple plaintiffs pending resolution of the case and determination of who is to bear the costs. *See* Davies v. Eli Lilly & Co., 131 Sol. J. 807 (Q.B. 1987), 3 All E.R. 94 (C.A. 1987), 1 W.L.R. 1136 (1987).

taken a number of steps and is considering others to establish minimum and relatively uniform standards among the twelve nations that are members of the Community.[44]

§3 OFFSHORE DISTRIBUTIONS AND RELEASE 4708

U.S. issuers raise substantial amounts of capital in the Eurocurrency markets.[45] These issues are typically debt issues (occasionally convertible debt) by well established companies undertaking financing through a subsidiary. The offerings are generally listed on an exchange (usually Luxembourg or London) which necessitates compliance with the appropriate listing requirements, but otherwise are not regulated based on the widely accepted "fiction" that they are exempt private placements.[46] The offerings are typically syndicated, often with the international subsidiary of a U.S. investment banking firm as the lead underwriter. A U.S.-type prospectus is typically used, although the securities are generally not registered with the Securities and Exchange Commission. Significant amounts of monies have been raised outside the U.S. by less established issuers generally in private placements, but in some instances through public offerings, particularly in the United Kingdom since the establishment of the Unlisted Securities Market under the auspices of the International (London) Stock Exchange.[47]

The Securities and Exchange Commission adopted Release 4708 in 1964 to facilitate distributions made outside the United States by U.S. issuers.[48] The Commission in Release 4708 announced that it would take no action for failure to register under the Securities Act securities offered outside the United States exclusively to foreign nationals so long as "the distribution is to be effected in a manner which will result in the securities coming to rest abroad."[49] For over twenty-five years, distributions were made outside the United States in reliance on Release No. 4708. Various techniques were employed to provide assurance that the securities were sold only to non-nationals of the United States and were not redistributed in the United States. The principal arrangement used in connection with the sale of Eurobonds was to lock them up for 90 days by agreements among the underwriters and dealers not to offer or sell the securities to U.S. nationals; the issuance of a global certificate for the en-

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44. *See* ICMSR, at §1.01[2], §1.08[3], §1.09[2].

45. During 1988, Eurobond issues aggregated $180.9 billion of which $72.1 billion was denominated in dollars. INSTITUTIONAL INVESTOR (int. ed.), Feb., 1989, at 125-30. These were not all by U.S. issuers, although a significant part represented offerings by U.S. issuers. *See* ICMSR, at §1.02[3].

46. On Eurobond issues generally, see A. Pergam, *Eurocurrency Financing*, in ICMSR, at ch. 9.

47. Fourteen U.S. issuers went public on the Unlisted Securities Market in 1986. *See Low Costs Attract*, Fin. Times, Jan. 20, 1987.

48. Registration of Foreign Offerings by Domestic Issuers, Securities Act Release No. 4708, Fed. Sec. L. Rep. (CCH) ¶1361-1363 (July 9, 1964).

49. *Id.* at 2124.

tire issue, the purchasers receiving only an interim receipt that could be exchanged at the end of 90 days for a certificate. To receive such certificate, the purchaser has to certify that he is not a national of the United States and has not purchased the securities for a national of the United States.[50] The Commission excluded distributions made in Canada from Release 4708. It was commonplace, therefore, in connection with Eurobond issues, to extend the lock-up provisions to sales made in North America or to North American purchasers.[51]

Although the lock-up procedures relating to non-convertible debt securities were well established, it was less certain as to what the staff would deem appropriate in connection with an offshore distribution of equity securities, including convertible debt, particularly as to the status of the securities after the expiration of the lock-up period. In 1985, the staff issued a no-action letter which clarified and liberalized the procedures relating to a distribution outside the United States of equity securities.[52] The procedures included (1) an undertaking by the underwriter not to offer the shares in the United States or Canada or to North American persons for twelve months following completion of the offering; (2) a conspicuous statement on the cover page of the prospectus that (a) the securities were not registered under the Securities Act, (b) could not be offered or sold in North America or to North American persons during such twelve-month period, and (c) then only (i) pursuant to an exemption from registration, or (ii) if registered, or (iii) if sold on the Stock Exchange in London; (3) a restriction on transfer for twelve months to North American persons; (4) a legend on the stock certificates issued in connection with the offering and during the restricted period reflecting the conditions; and (5) prior to any transfer purchaser had to certify that he agreed to such conditions and was not a North American person or acquiring the shares for any such person. *InfraRed* represented a liberalization of prior staff positions in that it accepted sales on a foreign stock exchange after the expiration of the restricted period as an appropriate alternative for reselling the securities acquired in the distribution.

§4 DISTRIBUTIONS PURSUANT TO REGULATION S—INTRODUCTION

In June of 1988, almost twenty-four years after the issuance of Release 4708, the SEC revisited Release 4708 and proposed to replace it with Regulation S.[53] In July of 1989, Regulation S was reproposed with a

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50. *See, e.g.*, Procter & Gamble Co., SEC No-Action Letter (Feb. 21, 1985).

51. The Proposing Release relating to Regulation S makes it clear, whether or not Regulation S is adopted, that the Commission has abandoned the qualification made in Release 4708 that the Release was not applicable to distributions made in Canada. Henceforth, distributions in Canada are to be treated on the same basis as other distributions made outside of the United States. See *infra* note 116.

52. InfraRed Associates, Inc., SEC No-Action Letter (Oct. 14, 1985).

53. Proposing Release, *supra* note 2. The Staff will not issue interpretative or no-action letters under Release 4708 until the Commission acts on proposed Regulation S. *Id.* at 89,130.

number of revisions[54] and its adoption in some form is imminent. Regulation S should facilitate offshore distributions by U.S. issuers and also will provide assurance that the long arm of the Securities Act registration provisions generally do not reach offerings made by foreign issuers outside the United States. Regulation S will also redefine a U.S. person so that the registration provisions of the Securities Act will no longer protect U.S. citizens residing outside the United States who purchase securities outside the United States and will permit U.S. institutional investors to organize a foreign affiliate for the express purpose of purchasing foreign issued securities outside the United States.[55] A Note to proposed Regulation S and the proposing Release stresses that Regulation S is applicable only to the registration provisions of the Securities Act and in no way limits the application of the anti-fraud provisions of the Securities Acts.[56] Regulation S also is not applicable to securities issued by a registered investment company, which have to continue to register securities distributed outside the United States.[57]

The Proposing Release refers to Regulation S as embodying a "territorial approach" in contrast to Release 4708 which was concerned with protecting U.S. investors. This is largely true as to securities issued by foreign issuers at least to the extent that they remain offshore for trading purposes. The principal difference in this respect, however, as to U.S. investors, is the new definition of U.S. persons. Insofar as individuals are concerned, it is probably of no great moment as it is doubtful if U.S. citizens residing outside the United States play an important role as investors in offshore capital markets.[58] It will, however, make a major difference for U.S. institutional investors which have affiliates organized under foreign laws, since such affiliates will not be deemed U.S. persons[59]

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54. Reproposing Release, *supra* note 2.

55. Rule 902(i).

56. Regulation S, Preliminary Note 1. The Proposing Release stressed that "the U.S. anti-fraud provisions should be broadly interpreted to rectify the damage suffered as a result of any fraudulent conduct." Proposing Release, *supra* note 2, at 89,129. On the extraterritorial application of the fraud provisions, see §11. Regulation S, of course, has no application to the blue-sky laws. Regulation S, Preliminary Note 4.

57. Rule 901(c).

58. Although Regulation S does not deal specifically with the issue and literally appears to put military personnel on permanent duty status outside of the United States outside the protection afforded by Securities Act registration for securities other than securities of registered investment companies, a footnote to the Proposing Release advises this may not always be the case, stating: "[O]fferings specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the armed forces serving overseas, would be deemed made within the United States." Proposing Release, *supra* note 2, at 89,135 n.106. The critical term appears to be "targeted" and seems to have in mind the infamous activities of Investors Overseas Services which although selling to others offshore initially was heavily aimed at U.S. military personnel. *See* C. RAW, B. PAGE, AND G. HODGSON, DO YOU SINCERELY WANT TO BE RICH? (1971), at ch. 4. Compare the issue of residence of military personnel for purposes of Rule 147. *See* H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW (1989 ed.)[hereinafter "SFCL"] at §4.04[4].

59. Rule 902(i)(1).

even if organized for the specific purpose of purchasing foreign securities. Such institutional investors will, in effect, have elected to be governed by the laws of the country in which the offering is made insofar as registration of the securities is concerned, provided the transaction takes place outside the United States.

Regulation S does not specifically deal with one of the more troublesome aspects of Release 4708 and that is when the securities can be resold in the United States. Rule 906 is a resale provision, but it is limited to resales outside the United States. Although no mention is made of this fact in the Reproposing release, without any fanfare the revised proposed Regulation S includes Preliminary Note 6 which states that securities acquired "pursuant to Regulation S may be resold in the United States only if they are registered under the Act or an exemption from registration is available." This issue is discussed below at §7[c]. Proposed Regulation S is loosely drawn in a number of other respects and requires reference to the Proposing Release and Reproposing Release[60] to fully appreciate how it will operate in a number of situations.

§5 THE GENERAL STATEMENT (NON-SAFE HARBOR) APPROACH

Regulation S sets forth a General Statement that offers and sales "that occur outside the United States" are not deemed an offer or sale for purposes of the registration provisions (Section 5) of the Securities Act.[61] If a transaction is within the scope of the General Statement, registration under the Securities Act is not necessary. For a transaction to qualify under the General Statement, both the sale and offer pursuant to which it was made must be outside the U.S..[62] Rule 901(b) sets forth a number of "relevant considerations," several of which are further defined in Rule 902, which are to be taken into account in determining whether offers or sales occur outside the United States. If the offers and sales meet these general considerations, the offering is deemed to have occurred outside the United States. Regulation S, however, also contains some non-exclusive specific safe harbors[63] which, if relied upon, assure that the offering will be deemed to have occurred outside the United States. Most issuers, presumably, will rely on one of the safe harbors and will fall back on the general provisions if there is inadvertent noncompliance with some aspect of the safe harbor. The General Statement provisions and definitions to some degree recur in the specific safe harbors and to this extent are also relevant.

Under the General Statement approach, relevant considerations in determining whether an offer and sale occurs outside the United States

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60. *See supra* note 2.

61. Rule 901.

62. Rule 901(a).

63. Rules 903 through 906 "set forth non-exclusive safe harbors for extraterritorial sales and resales of securities." Proposing Release, *supra* note 2, at 89,133.

include the following:

1. The locus of the constituent elements of the offer or sale.[64] The following factors are indicative that the offer and sale took place outside the United States:

a. Offers are directed only to persons outside the United States.

b. Buy orders originate outside the United States by buyers who are outside the United States.

c. Execution of the transaction, payment and delivery take place outside the United States. Payment into or from the U.S., however, would not necessarily indicate that a transaction took place in the U.S., but payment from and to a foreign location could, in combination with other indicia of a foreign transaction, lend weight to finding the transaction to be outside the United States.[65]

d. The sale is executed on or through the facilities of an established foreign securities exchange or designated organized foreign securities market.

2. There is no directed selling effort in the United States. Directed selling relates to efforts to condition the market in the United States for securities being offered pursuant to Regulation S.[66] "The presence of directed selling efforts in the United States would generally lead the Commission to find that the transaction occurred within the United States."[67] The concept of "directed selling efforts" is also relevant to the general conditions applicable to all the safe harbors and is discussed further below at §6[b].

3. The securities have come to rest outside the United States. This is, of course, the critical concept. The proposing Release has a general statement which makes it sound deceptively simple: "Generally, securities would be considered to have come to rest abroad if the distribution has been completed and resales into the United States are only made in routine trading transactions."[68] The Rule[69] includes a number of considerations to be taken into account in determining the likelihood that the securities have come to rest outside the United States:

a. The nationality of the issuer. There is a greater likelihood of the securities remaining outside the United States in an offering made abroad by a foreign issuer, the securities of which has no U.S. market interest, than in an offering by a U.S. issuer.[70]

b. The extent of the issuer's business presence in the United States.

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64. Rule 901(b)(1).
65. Proposing Release, *supra* note 2, at 89,131.
66. Rule 902(b).
67. Proposing Release, *supra* note 2, at 89,131.
68. *Id.* at 89,132.
69. Rule 901(b)(3).
70. Proposing Release, *supra* note 2, at 89,132.

c. The type of security being offered. Equity securities are more likely to flow back to the home country or primary market after distribution than debt securities.[71]

d. The absence of a substantial U.S. market interest in the securities of the issuer. A trading market in U.S. implies a demand for the securities on the part of U.S. investors, particularly if the securities offered abroad are of the same class as those traded.[72]

e. The contractual or other provisions restricting the resale of securities into the United States and to U.S. persons. This provision invites a do-it-yourself type of lock-up to prevent sales to U.S. persons and to prevent flowback. In fact, most issuers are likely to rely on the applicable safe harbors discussed below.

4. The justified expectations of the parties as to whether the U.S. registration provisions are applicable. A U.S. national who effects transactions in foreign securities markets under appropriate circumstances may be relying on the laws of the country in which the securities are being marketed or traded. The parties may adopt choice of law provisions to make this clear.[73] A choice of law provision, however, undoubtedly would not be controlling as to sales made in the United States or to U.S. persons as part of a distribution.

§6 THE SAFE HARBORS

[a] Introduction—Definition of a U.S. Person

The provisions of the General Statement that are obviously difficult to apply are those relating to whether or not the securities are likely to come to rest outside the United States. Since the safe harbor provisions deal extensively with this area, compliance with Rule 903, which provides that a distribution which satisfies the conditions of Rule 904 thorough 906 shall be deemed to occur outside the United States, is likely to be the choice of most issuers. The safe harbor provisions distinguish between sales made by the issuer and the distributors (underwriters and dealers, primarily) and their affiliates on the one hand and everyone else (the investors who purchase the issue).[74] The safe harbors attempt to assure that the offering is distributed outside the United States and the securities come to rest outside the United States by imposing on the issuer and

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71. *Id.* at 89,133.

72. *Id.*

73. *Id.*

74. The Commission's releases refer to two safe harbors—one for issuers and securities professionals involved in the distribution process and their affiliates (the "issuer safe harbor") and the other for resales by other persons (the "resale safe harbor"). *See* Reproposing Release, *supra* note 2, at 80,209. The issuer safe harbor is then divided into three separate categories. For exposition purposes in these materials the three separate categories are treated as three separate safe harbors and resales are discussed separately as part of a larger problem of resales offshore and resales in the U.S. or to U.S. persons.

distributor offering restrictions and transaction restrictions and imposing on the investors transaction restrictions. The offering restrictions, if applicable, always follow the same general format. The transaction restrictions, both as to nature and duration, depend upon the nature of the issuer, the type of security, and who is the seller. There are also certain general conditions that must be complied with in connection with all the safe harbors.

The concept of a U.S. person plays an important role in all safe harbor contexts except a distribution by certain foreign issuers. The concept of a U.S. person is concerned with purchasers rather than issuers of securities. Under Regulation S, U.S. persons, in a departure from old concepts, as to any natural person means a "person resident in the United States."[75] Thus, the appropriate consideration is residence rather than citizenship; a U.S. citizen who is a resident of France is not a U.S. person and a French citizen who is a resident of the United States is a U.S. person. A corporation or partnership organized under the laws of the United States is a U.S. person. An agency or branch of a U.S. entity, however, is not a U.S. person if it operates for valid business reasons and not for the purpose of investing in unregistered securities *and* is engaged in the business of banking or insurance which subjects it to substantive banking or insurance regulation in the country in which it operates.[76] Any U.S. entity can organize a corporation under the laws of another country even if for the purpose of purchasing securities and not be deemed a U.S. person.[77] A branch or agency of a foreign entity is treated as a U.S. person if it is located in the United States.[78] An estate or trust in which any executor, administrator or trustee is a U.S. person and a non-discretionary custodial account or similar account held by a dealer or other fiduciary for the account of a U.S. person are U.S. persons.[79] A discretionary custodial account or similar account held by a dealer or other fiduciary located in the United States is a U.S. person unless held for a non-U.S. person in which event it is a non-U.S. person.[80] Regulation S as initially proposed would have overturned a previous no-action letter to the effect that a U.S. broker-dealer with discretion to act for a non-U.S. person would be a non-U.S. person when acting in that capacity.[81] After receiving comments, the Commission revised proposed Regulation S to be consistent with *Baer*.[82]

The fact that a discretionary account managed by a U.S. broker-dealer or investment adviser for a non-U.S. person is a non-U.S. person, however, does not readily permit the U.S. broker-dealer or investment

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75. Rule 902(m)(1).
76. Rule 902(m)(3).
77. *See* Reproposing Release, *supra* note 2, at 80,217.
78. Rule 902(m)(1).
79. *Id.*
80. Rule 902(m)(1)-(2).
81. *See* Baer Securities Corp, SEC No-Action Letter (Oct. 12, 1979).
82. *See* Reproposing Release, *supra* note 2, at 80,217-18.

adviser to purchase securities distributed pursuant to Regulation S for its foreign clients if it does not maintain some type of office offshore. All of the Regulation S safe harbors require that the transaction be offshore which requires, among other things, that the broker-dealer or investment adviser be offshore at the time it receives the offer.[83] For the same reason, U.S. persons who are permitted to purchase securities of foreign issuers under certain circumstances pursuant to Regulation S (e.g., if issued in reliance on the category 1 safe harbor) will have difficulty in effecting a transaction offshore without maintaining an offshore presence. It cannot appoint a foreign agent to receive offers for it.[84] It could participate in such distributions by establishing a discretionary account with a foreign broker-dealer or investment adviser,[85] but would lose the ability to determine the securities to be purchased. U.S. institutional investors which are qualified institutional investors under Rule 144A will be able to purchase securities distributed offshore in the secondary market, but will have difficulty in becoming aware of such opportunities unless the security makes its way into a U.S. trading system, such as the NASD's proposed PORTAL Market.[86] A foreign broker-dealer could recommend the securities under very restricted circumstances in accordance with Rule 15a-6 without being registered as a broker-dealer, but the transaction would have to be executed by a registered broker-dealer.[87] A foreign broker-dealer with a U.S. affiliate that is registered may find it practicable to engage in such transactions, but Rule 15a-6 will discourage most others from soliciting such business. If the security is traded on a foreign stock exchange or in a designated organized foreign securities market, any U.S. person could purchase securities distributed pursuant to Regulation S in such market. If, however, the seller or the broker acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States, it will not be deemed an offshore transaction.[88]

The fact that transactions are effected on a foreign stock exchange has significance in a variety of contexts under the Regulation.[89] Foreign stock exchanges, unlike U.S. exchanges, trade a number of securities in various categories that are not technically listed, but, nonetheless, are traded under the auspices of the exchange. In recognition of this fact Regulation S introduces the concept of a "Designated Organized Foreign Securities Market" ("DOFSM") and generally treats such markets like an established foreign stock exchange for purposes of the Regulation. A Des-

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83. *See* §6[b] *infra*.

84. *See infra* note 95.

85. This follows from the fact that such foreign entity would be a non-U.S. person. The provision that a discretionary account held for a foreign person in the United States is a non-U.S. person operates in only one direction; there is no counterpart that a discretionary account held offshore for a U.S. person is a U.S. person. *See* Rule 902(m)(1)-(2).

86. *See* §8[g] *infra*.

87. *See supra* note 14.

88. Rule 902(g)(2).

89. *See*, for example, the discussion of resales under Rule 906 at §7[a].

ignated Organized Foreign Securities Market is one established under foreign law, has an established operating history, is subject to oversight by a governmental or self-regulatory body to which transactions are reported on a regular basis, and is designated so by the Division of Corporation Finance.[90] The Reproposing Release refers to the Association of International Bond Dealers, which regulates trading in Eurobonds, and the Unlisted Securities Market ("USM"), which is regulated by the International Stock Exchange in London, as two markets which would meet such criteria.[91]

[b] General Conditions

The safe harbors for issuers and distributors are divided into three categories which are distinguished by the offering and transaction restrictions imposed. All three categories, however, must comply with the same two general conditions:

1. The offers and sales must be made in an offshore transaction.[92] To be an offshore transaction:[93]

a. The offer must be made outside the United States.

b. The seller must reasonably believe that the buyer is outside the U.S. at the time the order is originated.

c. Execution and delivery must take place outside the U.S.

If, however, the transaction is executed on or through the facilities of an established foreign securities exchange or a designated organized foreign securities market, and is not pre-arranged by persons in the United States, the related offer must be made outside of the United States, but the buyer does not have to be outside the United States at the time the order is originated and the securities do not have to be delivered outside the United States.[94] The requirement as to a natural person is that the offer be made to the buyer himself outside the United States; it is not sufficient that it be made to his agent outside the United States.[95] Unsolicited buy orders transmitted from the United States and received by dealers outside the United States are not "offshore."[96] To be effected on a foreign exchange or designated securities market, the sale must be executed outside the United States by or through a member of the exchange and under the auspices of the exchange.[97]

2. There can be no directed selling effort in the United States in connection with the offering. Directed selling effort includes any activity un-

90. Rule 902(a).
91. Reproposing Release, *supra* note 2, at 80,211 n.24.
92. Rule 904(a).
93. Rule 902(g).
94. *Id.*
95. Proposing Release, *supra* note 2, at 89,134.
96. *Id.*
97. *Id.*

dertaken by the issuer, the distributor, a seller, or an affiliate of any of them that could reasonably be expected "to have the effect of, conditioning the market in the United States for any of the securities being offered" under Regulation S.[98] It does not preclude product advertising and routine corporate communications (including press releases relating to financial results or material developments) unrelated to a selling effort, provided there is no reference to the offering of securities.[99] The Reproposing Release attempts to make it clear that an isolated, limited contact with the U.S. would not destroy the availability of the safe harbor under the "conditioning the market" standard.[100] The Rule specifically precludes an advertisement relating to the offering being placed in a publication "with a general circulation in the United States."[101] A publication with a general circulation is one that is printed in the U.S. primarily for distribution in the U.S.; or has had during the preceding twelve months an average circulation in the U.S. of 15,000 or more; or during the preceding twelve months has had an average of fifty percent or more of its circulation in the United States.[102] The 15,000 threshold was selected to separate out publications which produce a separate edition for distribution in the United States. In such event, if the affiliated non-U.S. edition does not meet this criterion, the advertisement can appear in the home publication provided it does not appear in the U.S. publication.[103] In any event, a publication necessary to meet the requirements of foreign law and not including anything more than is legally required will not be deemed a directed selling effort.[104] "The presence of directed selling efforts in the United States would generally lead the Commission to find that the transaction occurred within the United States."[105] On its face, this would appear to preclude a concurrent registered or Regulation D offering in the United States. The proposing Release, however, assures that this is not the case, stating: "Legitimate selling activities carried out in the U.S. in connection with an offering of securities registered under the Securities Act or exempt from registration . . . would not constitute directed selling efforts with respect to offers and sales made under Regulation S."[106] Unlike some of the other conditions of the safe harbors, failure to comply with this condition makes the safe harbor unavailable for

98. Rule 902(b).

99. Proposing Release, *supra* note 2, at 89,131-32; Reproposing Release, *supra* note 2, at 80,210-11. Compare the similar situation in connection with a domestic offering once the issuer is in registration. *See* SFCL, *supra* note 58, §6.09[3].

100. Reproposing Release, *supra* note 2, at 80,210.

101. Rule 902(b)(1).

102. Rule 902(i).

103. Reproposing release, *supra* note 2, at 80,211.

104. Rule 902(b)(2).

105. Proposing Release, *supra* note 2, at 89,131.

106. *Id.* The Proposing Release also states: "[I]t is the general view [of the staff] that exempt or registered domestic offerings and offshore offerings meeting the conditions of the proposed rules should not be integrated." *Id.* at 89,126.

the entire offering.[107]

[c] Category 1—Certain Foreign Issuers

An offshore distribution can be made by certain foreign issuers without any restrictions other than the general conditions. Issues in this category include a distribution by any foreign issuer of any security if there is no substantial U.S. market interest ("SUSMI") in the class of securities to be offered or sold, if equity securities are offered or sold, or no substantial U.S. market interest in any of its debt securities, if debt securities are offered or sold.[108] An "overseas domestic offering" ("ODO") by any foreign issuer is also in category 1 without regard to whether there is a SUSMI.[109] A foreign issuer is one incorporated or organized under the laws of a foreign jurisdiction. However, an issuer is not a foreign issuer if fifty percent of its outstanding voting securities are held by persons with a U.S. address *and* any of the following factors are present: (a) more than fifty percent of the assets of the issuer are located in the United States; (b) the business of the issuer is administered principally in the United States; or (c) the majority of the executive officers *or* directors are U.S. citizens or residents.[110] An issuer organized under the laws of the United States is not a foreign issuer even if 100% of its stock is owned by non-U.S. citizens or residents. Query whether the sale of stock by a foreign issuer, the proceeds from which are to be invested in a wholly owned U.S. subsidiary, would be deemed a technical compliance to which Regulation S would not provide a safe harbor under Preliminary Note 2 because it is a scheme to avoid the registration provisions.[111]

Regulation S includes specific criteria for determining whether there is a substantial U.S. market interest ("SUSMI") in a security. There is a SUSMI unless "it can be established" that (1) fifty percent of all recorded trades in an equity security during the prior fiscal year occurred on or through the facilities of established foreign securities exchange or designated organized foreign securities market *or* (2) that less than twenty percent of all recorded trading in the class of securities in the prior fiscal year occurred in he U.S. organized securities markets *and* the U.S. trading did not constitute the largest single market for such securities.[112] This places a substantial burden on the issuer and distributors to show there is no SUSMI. If debt securities are offered, the criteria are based on all of the issuer's debt securities, not merely those in the same

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107. Reproposing Release, *supra* note 2, at 80,218.

108. Rule 905(a)(1).

109. Rule 905(a)(2.

110. Rule 902(e).

111. *Cf.* Rule 140 which provides that an issuer which offers its securities for the purpose of purchasing the securities of another issuer is regarded as being engaged in the distribution of the securities of the other issuer for the purpose of defining an underwriter under Section 2(11) of the Securities Act.

112. Rule 902(l)(1).

class. There is a SUSMI unless "it can be established" that debt securities of the issuer are held of record by fewer than 300 U.S. persons *or* that less than $1 billion of the principal amount of its debt securities is held of record by U.S. persons.[113]

An "overseas domestic offering" (ODO) is defined to include an offering by a foreign issuer "directed either to citizens or residents of the issuer's jurisdiction of incorporation or organization" and made "in accordance with customary local practices and documentation."[114] The definition does not elucidate on what part of the offering must be sold in the issuer's home country to qualify although apparently it is intended to embrace offerings primarily, if not exclusively, sold in such jurisdiction. The Reproposing Release distinguished such offering from a multijurisdictional offering and noted that if "a substantial portion of the offering would be immediately resold outside the domestic market," it would not conform with the definition.[115]

The Proposing Release makes it clear, whether or not Regulation S is adopted, that the Commission has abandoned the qualification made in Release 4708 that it (the Release) was not applicable to distributions made in Canada. Henceforth, distributions in Canada are to be treated on the same basis as other distributions made outside the United States.[116] The prior concern was that the Canadian offering might be a conduit for a distribution in the United States. The absence of a "substantial U.S. market interest" and the restrictions on directed selling efforts in the U.S. are intended to deal with this problem. The Proposing Release qualifies the safe harbor by noting that "trading of a substantial amount of such securities in the United States shortly after they had been offered overseas would indicate a plan or scheme to evade the registration provisions,"[117] and Preliminary Note 2 to Regulation S provides that the Regulation is not available notwithstanding technical compliance if the transaction is part of a plan or scheme to evade the registration provisions.

The category 1 safe harbor for a distribution by certain foreign issuers is unique in certain respects, including the following:

1. It does not preclude the sale of such issue to a U.S. person who is in the country in which the distribution is made and buys the security while in the country. The general conditions described above[118] preclude an offer from being made in the United States and a directed selling effort in the United States. They do not preclude a sale to U.S. persons if

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113. Rule 902(l)(2). Commercial paper exempt under Section 3(a)(3) of the Securities Act is included in making such determination, but if such securities are the only securities that would otherwise result in such determination the issuer does not have a SUSMI. Rule 902(l)(3).

114. Rule 902(h).

115. Reproposing Release, *supra* note 2, at 80,214-15.

116. Proposing Release, *supra* note 2, at 89,129 n.64.

117. Proposing Release, *supra* note 2, at 89,136.

118. *See* §6[b].

the offer and sale take place outside the United States. Restrictions on sales to U.S. persons are found in the transaction restrictions and, as is discussed below, transfer restrictions are not applicable to a distribution of securities of such a foreign issuer.

2. Neither the issuer nor the distributor has to adopt any offering or transaction restrictions. There may be a "catch-22," however, since a distribution in Canada, for example, may result, if there are no restrictions on resales to U.S. persons, in an immediate market developing in the United States and the contention could be made that there was a scheme to evade the registration provisions.[119] In an ODO, which most Canadian offerings would be, there may be SUSMI, in which event immediate resales in the United States markets appears likely. If the Commission adopts proposed Forms F-10 and F-9 for certain Canadian issuers, such issuers may consider registering the offering in the United States.[120]

Notwithstanding the fact that once the distribution is completed there is no specific restriction on resales in the United States, the combined effect of Sections 4(1) and 4(3) may preclude any dealer from selling the security without registration or an appropriate exemption in the United States for forty days.[121] Since it is relatively difficult to complete an offshore transaction with a U.S. person,[122] the advantages of category 1 are meaningful primarily because the absence of offering restrictions eliminates some of the inefficiencies of a category 2 offering and, in the context of an ODO of equity securities by a non-reporting foreign issuer with SUSMI, it avoids the onerous category 3 restrictions.[123]

[d] Offering Restrictions

Securities of all issuers other than category 1 issuers sold in reliance on a Regulation S safe harbor are subject to offering and transaction restrictions imposed on the issuer, the distributors and affiliates of the issuer and distributors and to transaction restrictions imposed on the investor-purchasers. The offering restrictions are procedures which the issuer and distributors must follow to assure compliance with the transaction restrictions during the appropriate restricted period. The transaction restrictions vary depending on the category of issuer and the class of se-

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119. *See supra* note 117.

120. *See supra* note 18.

121. This may be true because the Section 4(1) exemption is for transactions not involving an issuer, underwriter, or *dealer* and the Section 4(3) dealer exemption does not become effective until 40 days after the first date the security was bona fide offered by or through an underwriter. Although the Section 4(3) 40 day exclusion from the dealer exemption generally has not been applied to securities issued pursuant to an exemption, it is not clear that Regulation S is an exemption for this purpose. *See infra* note 159. The fact that Rule 144A imposes special resale restrictions on securities issued by non-reporting foreign issuers suggests that the Commission may not regard the Section 4(3) exemption as available for resales in the United States. *See* §8[d]-[e].

122. *See supra* note 83.

123. *See* §6[f] *infra*.

curities. The offering restrictions consist of the following:

(1) The written agreement of every distributor (underwriters and dealers)[124] participating in the distribution "pursuant to a contractual arrangement" to offer and sell the security in compliance with the applicable transaction restrictions and other requirements of the safe harbor, or pursuant to registration or an available exemption.[125]

(2) The offering materials and documents must include statements to the effect that the securities have not been registered under the Securities Act, cannot be offered or sold in the United States or to U.S. persons within the applicable restricted period unless the securities are registered or an exemption from registration is available.

(3) Such statements must be included (a) on the cover or inside cover page of any prospectus or offering circular, (b) in the underwriting section of any prospectus or offering circular, and (c) in any press release or advertisement made by the issuer or any distributor or any person acting on their behalf.[126] The appropriate statements may appear in summary form on the prospectus cover pages (presumably with a cross-reference to the underwriting section) and in press releases and advertisements.[127] If the offering restrictions are applicable, and they are not complied with, the safe harbor is not available for the entire offering.[128] This is likewise the situation if the restrictions on directed selling efforts in the United States are not complied with,[129] whereas failure to comply with other conditions of a safe harbor would result only in the safe harbor not being available for the particular offer and sale to which the failure related.[130] The restricted period during which the Offering Restrictions must be complied with is a period which commences with the closing of the offering or the date when first offered to persons other than distributors in reliance on Regulation S, whichever is the later, and expires a specified period of time thereafter as provided in the appropriate transaction restriction.[131] In the case of a continuous offering, it does not commence until the lead managing underwriter certifies that the distribution has been completed.[132] In any event, a distributor holding an unsold allotment will be deemed in the restricted period at the time of sale.[133]

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124. The term "distributor" encompasses underwriters and dealers who participate in the distribution "pursuant to a contractual arrangement." Rule 902(c). This definition is broad enough to cover the underwriting and selling groups. The term, however, does not necessarily encompass all Section 2(11) statutory underwriters. *See* Proposing Release, *supra* note 2, at 89,133.

125. Rule 902(f)(1).

126. Rule 902(f).

127. *Id.*

128. *See* Reproposing Release, *supra* note 2, at 80,218.

129. *See supra* note 107.

130. Reproposing Release, *supra* note, at 80,218-19.

131. Rule 902(k).

132. *Id.*

133. Rule 902(k).

[e] Category 2 — Reporting Issuers and Foreign Debt Issuers

The category 2 safe harbor covers offshore debt or equity distributions by reporting issuers (U.S. and foreign) and debt issues with SUSMI of non-reporting foreign issuers.[134] Such distributions have the benefit of the safe harbor if (1) the general conditions of Rule 904[135] are complied with, (2) the offering is not made in the United States or to a U.S. person for a period of forty days commencing from the date of closing or by a distributor with an unsold allotment, (3) appropriate offering restrictions as described above[136] are adopted, and (4) during the forty day restricted period distributors selling securities to other distributors, dealers, and persons receiving selling concessions or other remuneration deliver a confirmation or other notice advising the purchaser that it is subject to the same restrictions applicable to the selling distributor.[137] No distinction is made as to the conditions of the safe harbor between debt and equity securities in this category or between debt of reporting and non-reporting foreign issuers. Although the offering restrictions require participants in the distribution not to offer or sell the securities in the United States or to non-U.S. persons during the applicable period, there is no specified procedure for determining whether purchasers are non-U.S. persons, no legend need be included on the certificates, and no agreement or certification is required from the purchasers, although, as discussed below,[138] purchasers need and have their own safe harbor for resales. A specific noncomplying sale affects only that one transaction. If adequate offering restrictions are adopted, and a distributor makes offers or sales in violation of the transactional restrictions, offers or sales by other distributors are not affected.[139] The Reproposing Release cautions, however, that if the underwriter knows, or is reckless in not knowing, that a dealer to whom it intended to sell part of the issue "had consistently sold to U.S. residents in violation of the resale restrictions," the underwriter could not rely on the safe harbor.[140]

A reporting company is an issuer with a class of securities registered under the Exchange Act or which is required to file reports pursuant to Section 15(d) of the Exchange Act and has filed all required reports during a period of twelve months immediately preceding the offer or sale, or such shorter period during which it was required to file such reports.[141] There is no requirement that a company have been a reporting company for any specified period of time; hence, even a start-up issuer could voluntarily register a class of equity securities under Section 12(g) of the Ex-

134. Rule 905(b).
135. *See* §6[b].
136. *See* §6[d].
137. Rule 905(b).
138. *See* §7[a].
139. Reproposing Release, *supra* note 2, 80,218-19.
140. Reproposing Release, *supra* note 2, at 80,219.
141. Rule 902(j).

change Act and become a reporting company within the category 2 safe harbor.

Regulation S does not specifically provide that a subsidiary of a U.S. reporting company offering debt securities guaranteed by the parent will be deemed a reporting issuer for purposes of the safe harbor classification. If it is not, it is subject to the more severe restrictions of category 3. Form S-3, a simplified registration procedure under the Securities Act, provides that, if the parent guarantees debt securities of its subsidiary, Form S-3 can be used for the offering if either the parent or the subsidiary meet the eligibility criteria.[142] Since the investors will be looking primarily to the parent's credit reputation, there appears to be little justification not to look to it in determining whether the securities are issued by a reporting company. If Regulation S places the debt securities of the subsidiary into category 3 because it is not a reporting company, which appears to be the case, parent companies may be prone to make the offering directly to avoid the category 3 transaction restrictions.

Regulation S does not define debt securities and, therefore, it is not clear whether a debt security convertible into an equity security is a debt security, an equity security,[143] or both a debt and equity security.

[f] Category 3 Safe Harbor — For Non-Reporting U.S. Issuers and Equity Securities of Non-Reporting Foreign Issuers with a SUSMI

The category 3 safe harbor relates to the distribution outside the United States of all securities not covered by the other categories. This includes the offshore distribution of securities by a U.S. issuer which is not a reporting company and equity securities of a foreign issuer which is not a reporting company and which has a substantial U.S. market interest. In the case of such foreign issuers, the offering would be in category 3 rather than category 1 only if the distribution is multi-jurisdictional and, hence, not an ODO. The restrictions and other conditions of the category 3 safe harbor differ depending on whether debt or equity securities are offered. In the case of debt securities, the requirements are identical to those of securities of reporting companies in terms of the forty day restricted period, the application of the offering restrictions, and the confirmation that must be used in transactions between distributors and dealers. In addition, however, the securities on issuance must be represented by a temporary global certificate. The global certificate is exchangeable for definitive certificates at the expiration of the forty day restricted period. The purchaser to receive a certificate must certify that the securities are not owned beneficially by a U.S. person. In the case of equity securi-

142. Form S-3, General Instruction C.

143. Rule 405 under the Securities Act and Section 3(a)(11) of the Exchange Act and Rule 3a11-1 adopted thereunder all provide that securities convertible into equity securities are equity securities, but these definitions are not incorporated into Regulation S. *See* further discussion at §9.

ties, the restricted period during which the securities cannot be sold in the United States or to U.S. persons is twelve months rather than forty days. The offering restrictions and the confirmation requirements are applicable. In addition, to comply with the transfer restrictions, (i) the issuer must refuse to transfer securities if the sale was not made in compliance with the provisions of Regulation S, (ii) the investor purchaser of the securities must certify that he (she or it) is not a U.S. person (or is a qualified institutional buyer as defined in Rule 144A) and is not acquiring for the benefit of a U.S. person and (iii) the investor purchaser must agree to resell the securities only in accordance with the provisions of Regulation S, pursuant to registration or an exemption therefrom.[144] The means to implement the transfer restrictions on transfers to U.S. persons is up to the issuer. As a minimum, a transfer by a person with a non-U.S. address puts the issuer on notice and requires inquiry.[145] There is no specific requirement, however, that a legend be placed on the certificates.

[g] The Appendix A Safe Harbor Summary

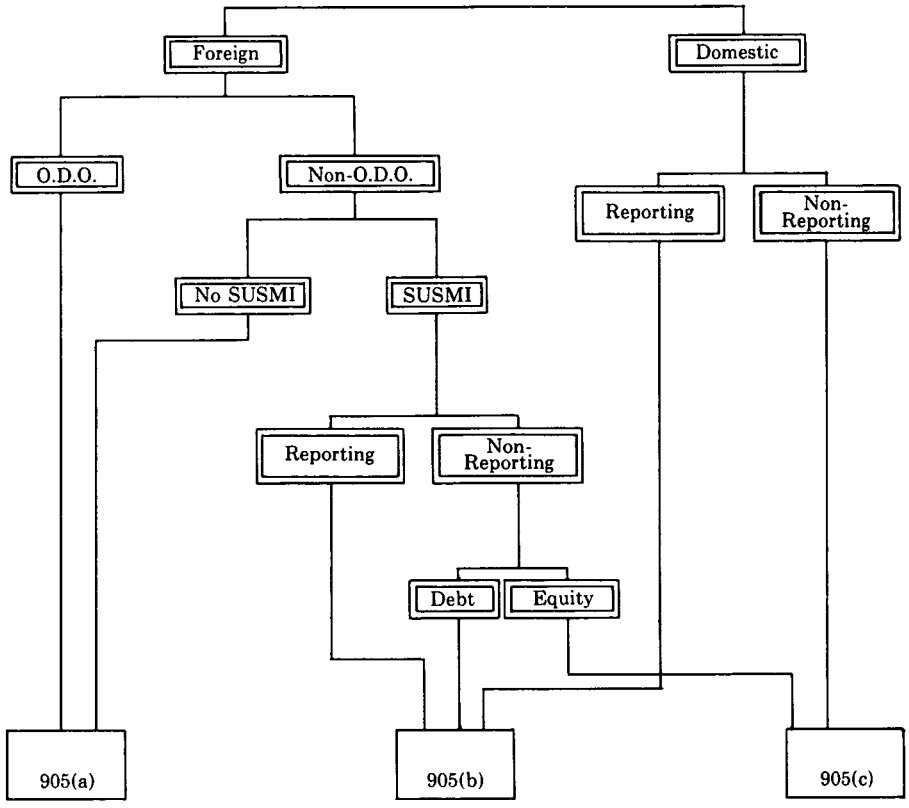
Appendix A to the Reproposing Release, which is reproduced below, is a helpful, tree-type guide and summary of how the sundry safe harbors apply to different types of offshore distributions by foreign and U.S. issuers respectively. One can readily discern from Appendix A that any ODO by a foreign issuer and any offshore offering of debt or equity security as to which there is no SUSMI by a foreign issuer are within the category 1 (Rule 905(a)) safe harbor. All other offerings by a foreign issuer are in category 2 (Rule 905(b)) except that an offering of a class of equity securities in which there is a SUSMI by a non-reporting issuer is within category 3 (Rule 905(c)). In the case of offshore distributions by U.S. issuers, all offerings by a reporting company are in category 2 and all offerings by a non-reporting company are in category 3.

144. Rule 905(c)(3).

145. Proposing Release, *supra* note 2, at 89,139.

APPENDIX A

RULE 905 CATEGORIES



O.D.O. = Overseas Domestic Offering

SUSMI = Substantial US Market Interest

§7 REGULATION S AND RESALES

[a] Securities Distributed Pursuant to Regulation S

There is a separate resale safe harbor for persons other than issuers and distributors.[146] Rule 906, however, deals only with sales outside the United States and does not provide a safe harbor for resales in the United States.[147] It is limited to resales by persons other than the issuer or distributor.[148] The investor-purchaser who is not a dealer or person receiving selling compensation or other selling remuneration can resell the securities without any restrictions other than the general conditions which require that the offer and sale take place offshore.[149] The further general condition that there be no directed selling effort in the United States is applicable only to the person selling the security. If the seller, however, is a dealer or other person receiving selling compensation, during the restricted period (which assumes a category 2 or 3 situation) such seller can resell subject to the same general conditions as the investor and purchaser, but neither the seller nor any person acting on his behalf can be aware of the fact that the offeree or buyer of the securities is a U.S. person. In addition, if the purchaser from such seller is also a dealer or person receiving a selling concession, the seller must deliver to the purchaser a confirmation or other notice stating that during the restricted period the securities can be sold only in compliance with Regulation S or pursuant to registration or an exemption from registration under the Act. The restricted period does not begin anew upon resale of the securities, but applies only to the remainder of the applicable period imposed in connection with the original distribution.[150]

The reproposed regulation does not specifically refer to resales on a foreign stock exchange or designated organized securities market since Rule 906 requires an offshore transaction which is specifically defined to include transactions executed in such markets. The accompanying release states that the resale safe harbor "would also permit resales of any securities on established foreign securities exchanges and designated organized

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146. Rule 906.

147. Preliminary Note 6 to Regulation S.

148. The Proposing Release contains some inconsistent statements in this respect. The Release states that once a distributor has distributed its allotment, it is like any other person reselling the securities it may reacquire. Proposing Release, *supra* note 2, at 89,133-34. Elsewhere the Release states that sales and "resales by issuers, distributors and their affiliates would *always* be subject to Rules 904 and 905" rather than 906. *Id.* at 89,139 (Emphasis added). A reasonable construction of all of this is that reference to resales is to those that are part of the distribution since there appears to be no reason to cut distributors out of the trading market once the distribution is completed so long as Rule 906 is complied with. This is reinforced by the specific restrictions applicable under Rule 906 to resales in that market by securities professionals included in reproposed Regulation S.

149. *See* §7[a].

150. Proposing Release, *supra* note 2, at 89,137.

foreign securities markets."[151] If the seller were a dealer, the notice delivery otherwise required would be required only if the seller knew that the purchaser was a dealer or person receiving selling remuneration.[152] Rule 906 as initially proposed restricted resales on exchanges to securities in the first two categories and specifically provided that neither the seller nor any person acting on his behalf can be aware of the fact that any counter-party to the transaction is a U.S. person.[153] This provision has been dropped from the Regulation, but awareness of the status of the counter-party is significant since Rule 902(g)(2) provides that the transaction in such market is not offshore if the seller or its agent is aware that the transaction has been pre-arranged with a buyer in the United States. The Proposing Release had said under its initial formulation that it was not intended to impose a duty of inquiry; the purpose was to avoid transactions pre-arranged in the U.S. and executed on a foreign exchange.[154] This comment appears appropriate with respect to the definition of an overseas transaction. The alternative of selling on a foreign exchange or designated organized foreign securities market ("DOFSM") is particularly significant as in most offerings made in the United Kingdom or Europe the securities are likely to be traded on an exchange or in an organized market established by an exchange once the distribution is completed. If, for example, a U.S. issuer which is a non-reporting company makes an offering in the U.K., concurrently listing the security on the Unlisted Securities Market (USM), the foreign investors who purchase securities in the offering can resell them through a U.K. broker who would sell them to a market-maker on the London (International) Stock Exchange on which USM securities are traded. The liquidity for such a security is as good as the market on which it is traded.

[b] Securities Issued in Reliance on an Exemption

Rule 906 is broadly framed so that it is not limited to the resale of securities issued in offshore transactions. It is also applicable to the resale of securities issued in the U.S. to U.S. persons in reliance on Regulation D or other exemption from registration and which are resold outside of the U.S. in reliance on Regulation S. The restricted period would commence on the date upon which the investor's securities were first resold in reliance on Regulation S.[155] If, for example, a U.S. resident purchased securities offered pursuant to Regulation D, prior to the expiration of the Rule 144 two-year holding period, he could sell them offshore complying with the provisions of Rule 906 and the restricted period imposed on his purchaser would commence with the sale to him, assuming it was the first offshore sale. If the securities are listed on a foreign securities exchange,

151. Reproposing Release, *supra* note 2, at 80,217.
152. *Id.*
153. Rule 906(b) as initially proposed.
154. Proposing Release, *supra* note 2, at 89,140.
155. *Id.*

they could be resold on the exchange in compliance with Rule 906 without regard to any restricted period.[156]

This aspect of Regulation S may prove to have considerable practical significance, particularly as to securities privately placed in the United States. If the security is traded on a foreign exchange or a DOFSM, purchasers would not have to hold the securities for the two-year holding period of Rule 144 in order to resell the security and insofar as the U.S. securities laws are concerned would have the liquidity afforded by the foreign securities market.

[c] Resales in the United States or to U.S. Persons

During the twenty-five years since the pronouncement of Rule 4708, the SEC staff has given repeated no-action letters as to what it would deem as adequate restrictions or lock-ups during the distribution and during a period following the completion of the distribution. The Proposing Release states as follows: "The staff traditionally has not expressed any view as to when or under what circumstances securities issued pursuant to Release 4708 could be resold in the United States or to U.S. persons. Rather, the staff has indicated that resales may be made only in compliance with the registration requirements of the Securities Act or an exemption therefrom."[157] The resales in the United States under 4708 had to find a Section 4(1) or other exemption;[158] Regulation S as proposed, unfortunately, does not wholly dissipate this issue. The reproposed regulation is somewhat less confusing in this respect than the regulation as initially proposed and there is a strong implication that the securities can be resold in the United States or to U.S. persons after the end of the restricted period. The issue, nonetheless, is not free from doubt.[159]

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156. *Id.* Presumably, Rule 906 could also be used to resell securities offered in the United States in reliance on Rule 147.

157. Proposing Release, *supra* note 2, at 89,125.

158. *See* §3 *supra*.

159. To fully understand the issues in this regard from a conceptual standpoint it is necessary to digress; a digression justified, perhaps, by the fact that it is also relevant to Rule 144A and the somewhat timid approach taken by the Commission. *See* §8[c]. James Landis and Benjamin Cohen, young proteges of Felix Frankfurter, then a Harvard Law School Professor, drafted what became the Securities Act of 1933, with very little in the way of a model to follow, as they rejected a blue-sky approach. *See* J. SELIGMAN, THE TRANSFORMATION OF WALL STREET (1982), at 63-68. In a stroke of genius, Landis and Cohen hit on an approach that in a few short paragraphs regulated a multitude of transactional situations, some of which they had no way of foreseeing (e.g., the development 40 years later of the Eurobond market). Section 5 of the Securities Act provides it is unlawful, absent an exemption, to sell securities that are not registered. Section 2(11) defines an underwriter as one acquiring shares from an issuer or an affiliate of an issuer with a view to distribution. In this rather simple fashion they achieved two goals: (1) to require registration whenever an issuer distributes securities, and (2) to require registration whenever affiliates (i.e., controlling persons) distribute securities. In addition, it was necessary to separate out trading transactions so that every time someone trades a security it would not be necessary to file a registration statement. This they did by providing an exemption for transactions not involving an issuer,

Regulation S takes the form of a Rule defining offer, offer to sell, offer for

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underwriter, or dealer. A further exemption, now Section 4(3), exempts dealer transactions other than for a period of time following the effective date of a registration statement during which dealers must deliver a statutory prospectus in connection with offerings by a non-reporting company and certain transactions in unregistered securities. Accordingly, for most purposes, one can read Section 4(1) as if it were an exemption for transactions not involving an issuer or underwriter.

Section 4(1) in conjunction with the Section 2(11) definition of an underwriter provides yeoman services. Never have so few words served so many purposes. As noted, in the public offering context it requires a public offering by an issuer or an affiliate to be registered. It also permits purchasers in a registered offering to resell securities without registration and for non-affiliates to trade the securities in the secondary market. Most importantly, for our immediate purposes, it also determines the extent to which securities acquired from an issuer in exempt transactions can be resold without registration. Exempt transactions run the gamut from the Section 4(2) exemption for transactions not involving a public offering, to the three Regulation D exemptions (Rules 504, 505, and 506), the intrastate offering exemption, the Section 3(a)(9) exemption for an exchange offer of one class of securities of an issuer for another class of the same issuer. Rule 144, which requires a minimum holding period of two years, provides a path for leakage into the public markets of securities issued in reliance on the Section 4(2) or Regulation D exemptions. Rule 147(e) provides a similar route for securities issued in reliance on the Section 3(a)(11) exemption if not resold into the interstate securities markets until nine months after the completion of the distribution.

Since Regulation S fails to specifically provide that resales in the United States after the expiration of the restricted period are within the Section 4(1) exemption, the availability of an exemption for such resales will depend upon the application of the Section 4(1) and 4(3) exemptions. Conceptually Regulation S provides that offshore offers and sales made in conformity with Regulation S are not deemed offers or sales for purposes of Section 5. Rules 901 and 903. Arguably, if there has not been an offer or sale for purposes of Section 5, the investor-purchaser is not an underwriter as it has not "purchased" a security with a view to distribution. This would leave the question of whether there would be a Section 4(3) exemption for dealers that made a market in the security distributed offshore pursuant to Regulation S after expiration of the restricted period. Section 4(3)(A) provides that the dealer exemption is not available with respect to unregistered securities until 40 days after the securities are first bona fide offered to the public by the issuer or by or through an underwriter. It has been held that this period does not commence to run until the securities are first publicly offered in the United States and this occurs when they are first quoted in an inter-dealer quotation system (as distinguished from when first traded). Kubik v. Goldfield, 479 F.2d 472 (3d Cir. 1973); SEC v. North American Research & Development Corp., 280 F. Supp. 106, *aff'd in part*, 424 F.2d 63, 81 n.14 (2d Cir. 1970); Lustgart v. Albert Teller & Co., 304 F. Supp. 771, 772 (E.D. Pa. 1969). In all of these cases, however, the securities were sold in the United States in violation of Section 5 as the seller was a statutory underwriter and, hence, did not have a Section 4(1) exemption. In fact, historically, Section 4(3)(A) has been applied only to securities distributed in violation of the registration provisions, although literally it is not so restricted. Section 4(3) clearly has no application to securities exempt pursuant to Section 4(2) or Rule 506 as Section 4(3)(A) is applicable only to securities publicly offered. In the context of an issuer exchange offering exempt under Section 3(a)(9), notwithstanding the fact that it involves a public offering, the Commission early on took the position that dealers are not subject to the requirement of delivering a prospectus under the dealer exclusion of the then third clause of Section 4(1) with respect to securities offered pursuant to an exemption. Securities Act Release No. 646 (Feb. 3, 1936). *See also* Jerome L. Coben, SEC No-Action Letter (March 12, 1986). When Section 4(1) was amended so as to move the dealer exemption into Section 4(3) and reduce the period of time during which dealers had to deliver a prospectus in the secondary market after completion of a public offering, the language of 4(3)(A) was added. It is clear from the legislative history that this was intended to make the exemption unavailable for securities distributed in violation of

sale, sale and offer to buy so that offers and sales made outside of the United States are not offers or sales for purposes of Section 5 and those made in the United States are offers or sales for purposes of Section 5.

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the registration provisions and that same legislative history indicates that it was not intended to affect "the nature or extent of the dealer's exemption." S. REP. No. 1036, 83d Cong., 2d Sess. 14 (1954). The critical question then is whether Regulation S is to be viewed as an exempt offering for this purpose. The fact that Rule 144A expressly includes a dealer exemption (*See* §8[e] *infra.*) suggests that it may not although such inclusion may merely be to avoid any question in this context. If it is not, the 40 day period should be measured from the public offering outside of the United States as otherwise a dealer could not effect a trade until someone placed a quotation in an inter-dealer quotation system and initiated a 40 day period in which all trades would be in violation of Section 4(3).

The problem of applying Section 4(1) initially achieved prominence in the context of securities issued in reliance on the Section 4(2) exemption for private placements. Rule 144 has been a regulatory success story in terms of encouraging private placements in which purchasers can assure themselves of acquiring a privately placed security that ultimately will have liquidity, in providing a reliable guide to dealers and selling shareholders as to when and to what extent restricted securities can be sold without registration, and in providing a stock of additional securities for the trading market. Conceptually, the resale exemption is based on declaring that persons reselling securities are not Section 2(11) underwriters if they comply with the Rule (Rule 144(b)) and that the broker effecting the unsolicited transaction initially required by the Rule is exempt under Section 4(4). (Rule 144(f) & (g)).

The other way of reselling securities issued in exempt transactions is to sell them in a private transaction. Conceptually the Section 4(2) exemption is not available for such transactions as Section 4(2) is an exemption for transactions with an issuer not involving a public offering. Further, whether Section 4(1) is available depends upon whether the purchaser is a statutory underwriter which in turn depends upon whether he purchased with a view to distribution as distinguished for investment. If a view to distribution were synonymous with a view to resale, then resales to private purchasers might result in characterization of the reseller as an underwriter. Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959) resolved all of this by interpreting the "with a view to distribution" language of Section 2(11) as meaning with a view to selling in a public offering and by applying the SEC v. Ralston Purina Co., 346 U.S. 119 (1953), criteria for determining the availability of the Section 4(2) exemption to the resales in determining whether or not the seller is a statutory underwriter. The result is a Section 4(1-½) exemption for resales of securities acquired in a exempt transactions to sophisticated investors who have access to substantially the same information that would be available in a registration statement.

Although the 4(1-½) exemption developed in the context of a Section 4(2) private placement, it would appear applicable to any security issued in an exempt transaction if emphasis is placed on the fact that it is in fact a Section 4(1) exemption and the ultimate issue is whether the purchaser in the exempt transaction is a statutory underwriter. It could be argued that if the repurchaser is merely sophisticated and not an accredited investor that there are more than 35 purchasers in a Rule 506 and 505 offer if there are resales in reliance on *Gilligan, Will.* The restriction on resales, however, imposed by Rule 502(d) for this purpose attributes to securities acquired under Reg. D the status "of securities acquired in a transaction under section 4(2)" and the issuer must "exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(11) of the Act." Rule 144A is a codification, and a narrow one at that, of the 4(1-½) exemption, providing a conclusive presumption that if the conditions of the Rule are complied with that the purchaser will be deemed able to fend for itself. Conceptually it also takes the form of providing that the non-issuer seller of securities complying with the conditions of the Rule will not be deemed an underwriter for purposes of Section 2(11) or for purposes of Section 4(1) of the Act. Rule 144A(b). See the further discussion of Rule 144A at §8.

Regulation S includes a number of safe harbors which, if complied with, result in the offer or sale being deemed made outside of the United States and, hence, not subject to Section 5. Regulation S, however, does not deal with resales into the United States except, possibly, by implication. If such resales are to find an exemption, presumably they will have to find it for the seller under Section 4(1) of the Securities Act for transactions not involving an issuer, underwriter, or dealer and for the dealer under the Section 4(3) dealer exemption.[160] Rule 144A is explicitly available for such resales.[161] Although securities sold offshore are not technically restricted securities for purposes of Rule 144, the staff has treated them as such and the proposed amendments to Rule 144 make explicit provisions for securities that ordinarily would have been distributed in reliance on Regulation S.[162]

There are two relevant resale periods: while the Regulation S transaction restrictions are still in effect and after such restricted period. There are two relevant prospective purchasers in a resale; offshore purchasers who are not U.S. persons and U.S. purchasers (sales made in the U.S. or offshore to U.S. persons). Regulation S deals directly only with offshore purchasers; it does not distinguish explicitly between the two relevant resale periods, and the offering restrictions, which are intended to give notice of the specific conditions to which the offshore purchasers are subject, do not deal with the status of the securities after termination of the restricted period except by implication.

The category 1 safe harbor has no specific restricted period as there are no offering restrictions or transaction restrictions, merely general conditions one of which is that the securities be sold and resold offshore. Presumably, this condition does not continue for category 1 securities any longer than it would for category 2 securities. One cannot be certain, however, since Rule 144A as proposed and the proposed amendments to Rule 144 appear to be designed to keep securities of non-reporting foreign issuers either offshore or within a market confined to qualified institutional investors.[163] The category 2 safe harbor precludes any sales of securities of a reporting issuer in the U.S. or to U.S. persons for forty days after the closing;[164] and the category 3 safe harbor imposes a forty day restricted period on debt securities in that category and a twelve month restricted period on equity securities.[165] Sales can be made in the United States or to U.S. persons if the securities are registered or an exemption from registration is available during the restricted period. There is nothing in the restrictions relating to sales in the United States or to U.S. persons of securities of reporting companies and debt securities of non-reporting

160. *See supra* note 159.
161. *See* §8.
162. *See* §8[e].
163. *Id. See also supra* note 121.
164. Rule 905(b)(2).
165. Rule 905(c)(2)-(3).

companies that extends beyond forty days after the closing nor as to category 3 equity securities beyond one year. The purchaser, however, as to category 3 equity securities must agree to resell such securities only in accordance with Regulation S, or if the securities are registered or exempt from registration. These conditions literally continue indefinitely.[166] The offering restrictions, however, which are designed to put the purchaser on notice of the transaction restrictions specifically refer to limitations on offers and resales by the purchaser "within the restricted period."[167] Similarly, the notice disclosure required of dealers under Rule 906 (which is applicable to both categories 2 and 3 securities) also refers to limitations on resales "during the restricted period."[168] The reasonable construction, therefore, appears to be that all the transfer restrictions in the Regulation are applicable to the restricted period only.

Regulation S, however, purports to deal only with offshore distributions and does not specifically provide when shares may be resold to U.S. persons or in the United States. The implication that one would ordinarily make is that once the restricted period has expired the securities can be freely resold in the United States. There is, however, the troubling fact that under Release 4708 the staff always insisted that at the end of the lock-up period an appropriate exemption had to be found for the sale of the securities in the United States or to U.S. persons.[169] Somewhat ominously, the reproposed Regulation includes a Preliminary Note 6 which, although not specifically referring to the period after the restricted period, says something very similar: "Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available."

The Proposing Release contains a number of statements that deal with this issue although it is difficult to reconcile them with Preliminary Note 6. Commenting on the General Statement, the Proposing Release observes that "if the distribution has been completed and resales into the United States are only made in routine trading transactions," generally the securities "would be considered to have come to rest abroad."[170] Spe-

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166. Rule 90b(c)(3).

167. Rule 902(f)(2).

168. Rule 906(b)(2).

169. *See supra* note 157. The following is a fairly typical statement of the old staff position. "[W]e express no view as to when or under what circumstances the securities may be reoffered or resold in the U.S. or to its citizens or residents. Any such reoffers and resales must be made in compliance with the registration requirements of the 1933 Act or pursuant to an exemption thereunder. The availability of any such exemption would depend upon the facts and circumstances existing at the time of such reoffers and resales." Sears Overseas Finance N.V., SEC No-Action Letter (June 11, 1982).

170. Proposing Release *supra* note 2, at 89,132. The comment was prefaced with the reiteration of a statement in Release 4708 to the effect that trading in the United States shortly after completion of the distribution would be an indication that the distribution was "in fact being made by means of such trading." *Id.* The Release then discusses flowback, noting that equity is more likely to flowback to the issuer's home country or primary market

cifically, the Release states, referring to securities of a reporting issuer, that the purpose of the transactional restrictions is not to prevent flowback, but "to prevent securities from entering the U.S. capital markets while the market has been preconditioned for such securities . . . ."[171] The Proposing Release further sets forth as one of the basic propositions of the safe harbor provisions "that periodic reporting under the Exchange Act can be relied upon for the protection of investors once the marketing effort has been completed. After the foreign distribution has been completed and the marketing efforts have terminated, routine secondary trading may begin as a matter of course. Where issuers are not subject to the reporting requirements of the Exchange Act, resale restrictions previously developed under Release 4708 to protect against flowback would continue."[172] This suggests that once the restricted period has expired, the securities of a reporting issuer can be traded in the United States; presumably, in reliance on the Section 4(1) exemption for transactions not involving an issuer or underwriter and the Section 4(3) dealer's exemption, but that securities of a non-reporting issuer may have to be registered or an exemption established. The Proposing Release also specifically states in the section dealing with securities of a reporting company as follows: "Upon expiration of the restricted period, securities sold in reliance on the safe harbor will be viewed as unrestricted."[173]

The Proposing Release expressed concern about the flowback of equity securities of non-reporting companies because of the lack of information about them in the marketplace.[174] This may or may not explain the staff's apparent reluctance to acknowledge as to such securities that after the appropriate restricted period the securities can be resold in the United States without registration in reliance on Section 4(1) much as securities which are registered or offered pursuant to Regulation A can be resold by the ordinary investor.[175] The Proposing Release suggests that Regulation S imposes substantially the same restrictions as *InfraRed* on securities of a non-reporting issuer.[176] Those restrictions required that after the restricted period the securities could be resold in the United States only pursuant to registration or if an exemption was available, or they could be resold offshore on a foreign securities exchange. This obvi-

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than debt and that the existence of a trading market in the security in the United States increases the likelihood of flowback. *Id.* at 89,133. This seems to assume that so long as there is any danger of flowback to the United States that the securities have not come to rest offshore. Perhaps, it means no more than that a longer period of time must elapse between the completion of the distribution and routine trading transactions in the United States in the case of equity securities that have a trading market in the United States in order for the securities to be deemed to have come to rest offshore.

171. Proposing Release, *supra* note 2, at 89,136.

172. *Id.* at 89,129.

173. Proposing Release, *supra* note 2, at 89,137 n.113. The same note observes that this would not be true as to securities held by a distributor representing an unsold allotment.

174. Proposing Release, *supra* note 2, at 89,138.

175. *See* SFCL, *supra* note 58, §4.08[2][e].

176. Proposing Release, *supra* note 2, at 89,139. On the *InfraRed* restrictions, see §3.

ously is something less than being unrestricted after the expiration of the restricted period (twelve months as to category 3 equity securities).

Regulation S, although cast in terms of offers and sales that occur outside the United States, nonetheless, focuses on the concept of securities coming to rest outside the United States as being determinative of whether a distribution is in fact completed outside the United States. The other side of that coin is whether or not purchasers are statutory underwriters as that term is defined by Section 2(11) of the Securities Act. If the securities have come to rest, the distribution in the Section 2(11) sense is completed and, absent extraordinary circumstances,[177] persons other than affiliates of the issuer can resell the securities in reliance on the Section 4(1) exemption for transactions not involving an issuer or an underwriter.[178] On this basis, once the restricted period of the specific safe harbor provision has expired, the securities should be deemed to have come to rest and the distribution ended so that thereafter the securities can be resold in the U.S. or to U.S. persons in reliance on the Section 4(1) exemption.[179] Unfortunately, neither proposed Regulation S nor the Proposing or Reproposing Release explicitly so states.

The question is somewhat less disconcerting if the securities are listed on a foreign exchange or traded in a designated organized foreign securities market. In that event, the securities could be resold on the exchange or the DOFSM during the restricted period as well as after under the provisions of Rule 906.[180] The issuer, however, in the case of category 3 equity securities, would have an obligation not to transfer the securities unless such transfer is made in compliance with Regulation S.[181] Query whether this precludes a transfer to a U.S. purchaser of securities resold pursuant to Rule 906 on a foreign stock exchange.[182] A distributor is precluded from selling category 3 equity securities to a U.S. person for a period of one year, but there is no express limitation on the resale by the foreign investor-purchaser under Rule 906(a) other than the general conditions. To be an offshore transaction under Rule 902(b)(g) neither the seller nor any person acting on the seller's behalf can know that the

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177. The now largely discredited presumptive underwriter doctrine might treat someone purchasing a large part of the offering as a statutory underwriter even after the securities have come to rest. *See* SFCL, *supra* note 58, §5.06 n.7.

178. *See supra* note 159.

179. Compare the coming to rest concept of the Rule 147(e) safe harbor under which an intrastate offering is deemed to come to rest within nine months after the completion of the distribution. A court has held that under the particular circumstances of the case securities sold in reliance on the intrastate offering exemption and resold in the interstate market after seven months had come to rest notwithstanding Rule 147(e). Busch v. Carpenter, 827 F.2d 653 (10th Cir. 1987).

180. *See* §7[a] *supra*.

181. *See* §6[f] *supra*.

182. If the buyer during the restricted period turns out to be a U.S. person, the buyer will have no notice of the restrictions and will be quite surprised if on transfer the issuer refuses to transfer the securities in compliance with the category 3 restrictions relating to equity securities.

transaction has been pre-arranged with a buyer in the United States. This probably does not impose any duty on the seller to inquire as to the residence of the buyer provided the transaction is not pre-arranged with a U.S. buyer.[183] The transaction restrictions, however, expressly require the issuer to refuse to transfer the securities to a U.S. person during the restricted period. The effect will be to require the U.S. purchaser to resell the securities during the restricted period in the foreign market and keep the securities from being traded in the United States during the restricted period unless registered.

There is also the opportunity for securities sold offshore to make their way back to the United States through the private market that is expected to develop as a result of the adoption of Rule 144A. One of the purposes of Rule 144A is to permit qualified U.S. institutional investors to acquire securities, particularly securities of foreign issuers, distributed offshore. If a Rule 144A purchaser acquires securities of a reporting issuer during the forty day restricted period, an interesting question arises as to whether the securities would no longer be restricted after the expiration of the forty day period. On the assumptions made above, such securities would be unrestricted if held by the foreign investor for the entire period. Securities sold in reliance on Rule 144A, however, are restricted securities as defined by Rule 144(a)(3).[184] If this is the appropriate classification, Rule 144 would require a two year holding period measured under proposed revisions to Rule 144(d)(1) from the date initially purchased from the issuer. Under these assumptions, qualified institutional investors presumably would purchase the securities only if convinced that there will be a liquid Rule 144A market for them and ordinarily will prefer purchasing them on the foreign market in which they trade. In the case of category 1 securities issued by a foreign issuer, the qualified institutional investor (or, for that matter, any institutional investor) could purchase the security in the initial distribution in an offshore transaction, but that would require a presence offshore to effect the transaction.[185]

The proposed amendments to Rule 144 and the reproposed Rule 144A[186] treat securities of foreign issuers which are non-reporting companies differently from all other securities in an apparent attempt to prevent their leakage into the public U.S. markets. The approach is discussed below as part of the discussion of Rule 144A.[187] The implication is that such securities do no lose their restricted character after the expiration of the restricted period (as to category 3 securities) and that category 1 securities of a non-reporting foreign issuer are restricted notwithstanding the absence of a restricted period.

The extent to which trading will be precluded beyond the restricted

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183. *See supra* note 154.
184. Rule 144A.
185. *See* §6[c] *supra.*
186. *See* §8[e].
187. *See* §8 *infra.*

period depends on resolution of the issues discussed above. Such issues, unfortunately, give rise to the type of theology prevalent for years relating to "investment intent" prior to the adoption of Rule 144.[188] For the most part, it will not be a concern of the underwriters who can rely on the safe harbor except to the extent some of the participants in the underwriting may be concerned about their clients and insist on an opinion as to the free trading nature of the securities after the restricted period. Qualified institutional purchasers will also have concerns in this regard and may want assurance in the form of an opinion of counsel. It will also be of concern to issuers, particularly with respect to category 3 equity securities, as to which issuers must establish a mechanism for preventing transfers of record to U.S. purchasers. Although in most instances, a resale after the restricted period, if a violation of Section 5, should not place the entire "exemption" in jeopardy,[189] it, nonetheless, will be a troublesome transfer agency problem and will place a premium (as was the case of pre-Rule 144 opinions) on obtaining an opinion from counsel who tends to see the issue in oversimplified terms. The most concerned party, perhaps, should be the National Association of Securities Dealers. The NASD proposal to establish the PORTAL market assumes that the NASD and its members will be responsible for determining when securities can exit the private market[190] and uncertainties in this regard as to securities distributed under Regulation S could introduce severe inefficiencies.

In the case of reporting issuers, there may be little difficulty in relying on statements in the Proposing Release that after the end of the restricted period the securities can be traded in the United States. This was probably the general position of the bar under Release 4708, notwithstanding the staff's admonitions. There is little evidence that enforcement personnel of the Commission attempted to police leakage into the U.S. securities markets of securities distributed under 4708 once the lock-up period expired. It would, nonetheless, be helpful if Regulation S specifically stated that persons acquiring securities issued in compliance with the provisions of Regulation S will not be deemed an underwriter for purposes of Section 4(1) and that dealers have the Section 4(3) exemption with respect to sales in the U.S. or to U.S. persons after the expiration of the restricted period. If the Commission is intent on making distinctions in this regard (e.g., reporting issuers versus non-reporting issuers generally or non-reporting foreign issuers specifically) on the basis of public policy, this should be done by Rule and not through ad hoc staff interpretations of Section 4(1).

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188. *See* SFCL, *supra* note 58, §§4.08[2][d], 4.10.

189. *See supra* note 130.

190. *See* §8(g).

§8 PROPOSED RULE 144A AND INTERRELATIONSHIP OF REGULATION S WITH RULE 144 AND PROPOSED RULE 144A

[a] Introduction

Although not referred to in Regulation S, it was the position of the staff under Release 4708 that securities distributed in reliance on the Release would be treated as restricted securities for purposes of Rule 144 and could be resold in compliance with Rule 144 after the appropriate holding period.[191] This would require a two year holding period before such an exemption would be available[192] and would be relied upon only if there is not a Section 4(1) exemption at the end of the Regulation S restricted period. It provides a conservative (and last resort) means of assuring that securities sold offshore can be resold in the United States without violating Section 5. The Commission has proposed to amend Rule 144 so as to increase the liquidity in the "market" for restricted securities. However, it has done so in a fashion, as is discussed below, that reflects considerable concern about the flowback into the United States of securities of non-reporting foreign issuers offering securities offshore in reliance on Regulation S.

Rule 144A was proposed in October of 1988[193] and reproposed in a drastically revised form in July of 1989.[194] The reproposal was accompanied by requests for comments in a number of areas and the Rule as finally adopted may differ from the proposed rule. Rule 144A is not an exemption for issuers, but like Rule 144, is an exemption for persons reselling securities acquired in exempt transactions, including for this purpose, securities sold pursuant to Regulation S. If Rule 144A is adopted, securities distributed offshore could be resold at anytime by the purchasers to institutional investors meeting the prescribed qualifications of the rule whether the sale is in the U.S. or offshore. The availability of the exemption depends upon (1) the buyer, (2) the security, and (3) complying with the formalities imposed by the rule. It is a narrow and restricted codification of what has been referred to as the Section 4(1-½) exemption, involving the resale of securities acquired in an exempt transaction to purchasers able to fend for themselves.[195] As *Gilligan, Will* emphasized, the purchasers to meet the *Ralston Purina* criteria (1) must be

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191. Int. Income Property, Inc., SEC Div. Corp. Fin. No-Action Letter, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶76,785 (Dec. 12, 1980).

192. Rule 144(d)(1). In many instances, for securities not traded in the United States it would require a three year holding period since it would not be possible to effect the transaction in the manner required by Rule 144(f) and/or to satisfy the current information requirement of Rule 144(c). Reliance in that event would have to be placed on the three year holding period of Rule 144(k). Query, however, if Rule 144 would be available at all under those circumstances since the no-action position does not specifically deal with the availability of Rule 144(k) for securities distributed offshore.

193. *See* Rule 144A Proposing Release, *supra* note 2.

194. *See* the Rule 144A Reproposing Release, *supra* note 2.

195. *See supra* note 159 for a discussion of the Section 4(1-½) exemption.

sophisticated and (2) must have access to the same information as would be available if the securities were registered.[196] Under Rule 144A, certain institutional investors as to certain categories of securities are deemed to be sophisticated and are conclusively presumed to have access to the appropriate information. Being freed of the latter responsibility is no insignificant concession; *Gilligan, Will* found a Section 5 violation because the sophisticated investors had not been furnished with adequate information.[197] Rule 144A is not exclusive and it is apparent that many transactions that will not have the benefit of Rule 144A in its initial incarnation are exempt under a *Gilligan, Will* Section 4(1-½) analysis.[198]

[b] Qualified Institutional Buyers

To be a qualified institutional buyer, the buyer must be an institution described in Rule 144A(a) and at the end of its last fiscal year it must have assets invested in securities that were purchased for more than $100,000,000. Institutional buyers are defined substantially in the same manner as accredited institutional investors in Rule 215 and Rule 501(a)(1)-(7) of Regulation D except self-directed pension plans and accredited investors who are natural persons are not included.[199] Institutional buyers include banks, savings and loan associations, insurance companies, broker-dealers, registered investment companies, an employee benefit plan if investment decisions are made by certain specified plan fiduciaries, broker-dealers registered under the Exchange Act, any corporation or Massachusetts or similar business trust, and tax-exempt charitable corporations. The $100 million investment in securities criterion excludes a large number of institutional investors. According to statistics cited by the Commission there are approximately 3,000 of the institutional investors in the principal categories that will meet the criteria.[200] Qualified institutional buyers also include any investment company registered under the Investment Company Act which is part of a family of registered investment companies with aggregate total investments in securities at a cost exceeding $100 million, and any registered investment adviser with investments in securities at a cost in excess of $100 million (including for this purpose investments in securities which it purchased and which it manages for the accounts of others).[201]

There is an important qualification relating to most of the qualified institutional investors; that is, they are qualified institutional investors

196. Gilligan, Will & Co. v. SEC, 267 F.2d 461, 466 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

197. 267 F.2d at 466-67.

198. *See supra* note 159.

199. Rule 144A(a)(1).

200. Reproposing Release, *supra* note 2, at 80,224 n.16.

201. Rule 144A(a)(2). There are also special provisions for determining the $100,000,000 invested in securities criterion for banks and other institutions investing in a fiduciary capacity and for bank holding companies. *See* Rule 144A(a)(4)-(6).

only with respect to purchases for their own account. This will be particularly difficult for investment advisers since, although they may include managed portfolios in determining whether they meet the $100 million criterion, they are not Rule 144A purchasers with respect to purchases made for the accounts managed by them.[202] There is, however, a special category for banks and savings and loan associations and similar institutions which exercise investment discretion with aggregate assets invested in securities purchased at a total cost of more than $100 million. Such institutions are Rule 144A purchasers when "acting in a fiduciary capacity."[203] The high qualification requirements will also exclude most broker-dealers; according to statistics included in the Reproposing Release only 102 broker-dealers will qualify as Rule 144A purchasers.[204] This is unfortunate because the real promise for a liquid Rule 144A market lies in broker-dealers acting as market makers and only those meeting the definition of a qualified institutional investor will be able to do so. There may well be a number of revisions in the definition of qualified institutional investors in the rule when adopted.

[c] Eligible Securities

Although not used in the Rule and not a defined term, the concept of "fungible securities" plays an important role in determining securities that do not have the benefit of the Rule. The concept under the reproposed rule embraces securities which are part of the same class as securities listed on a U.S. securities exchange or traded in an automated U.S. inter-dealer quotation system (which includes NASDAQ, but excludes the pink-sheet market), and securities issued by a registered open-end investment company, unit trust, or face-certificate company.[205] Securities not traded in any organized securities market or only traded in the "pink sheets" or other non-automated inter-dealer trading system, and securities traded on a foreign securities exchange or DOFSM are not fungible securities for this purpose. Securities which were not fungible *when issued* and which are sold to a qualified institutional buyer have the benefit of the safe harbor provided for by Rule 144A provided the additional conditions of the Rule are complied with.[206] A convertible security, if it can be converted into the underlying security within three years from the date of issuance, is two securities both of which (the convertible security and the underlying security) must be non-fungible in order for the safe harbor to be available.[207] Fungible securities do not have the protection of Rule 144A and reliance would have to be placed on the Section 4(1-½) exemption even though the transaction is with a qualified institutional

202. Rule 144A(a)(2).
203. Rule 144A(a)(4).
204. Reproposing Release, *supra* note 2, at 80,224 n.16.
205. *See* Rule 144A(d)(3).
206. Rule 144A(d).
207. Rule 144A(d)(3)(i).

investor.

[d] Informational Requirements and Other Conditions

In all transactions in which the seller relies on Rule 144A, the seller must take reasonable steps to assure that the buyer is aware that the seller may rely on Rule 144A. If the issuer of the securities sold in a Rule 144A transaction is a reporting company and the foregoing conditions are complied with, there are no further conditions. If the issuer is a non-reporting company, with the exception noted below, upon request of the buyer the seller must furnish the buyer with a brief description of the issuer's business and the product or services it offers; its most recent balance sheet and income statement and similar statements for the preceding two fiscal years which should be audited to the extent available.[208] If the issuer is a foreign issuer, which is a non-reporting company but which is exempt from registration under the Exchange Act by Rule 12g3-2(b) (which requires it to file with the Commission such reports and other related information that it must file with the authorities and the stock exchange in the country in which it is domesticated), the seller does not have to furnish such information.[209]

The requirement that information relating to non-reporting companies be furnished by the seller upon request has drawn the criticism of the investment banking community.[210] There is concern as to how the sellers will obtain such information which will have to come either from the issuer, reports of the issuer if such are available, or from secondary sources. The need to furnish such information, if requested, will introduce inefficiencies to the market process. There is also concern about potential liability for the information the sellers furnish. The PORTAL market discussed below will not rectify this situation as the NASD has rejected the notion that such information be inputted on the PORTAL computer. Since qualified institutional investors have extensive research resources available to them, imposing such obligation on the seller appears unnecessary. By the same token, however, it appears unlikely that most eligible purchasers will request such information unless it is not conveniently available to them.

There are approximately 1500 foreign issuers which file the necessary home country reports with the SEC in order to maintain the Rule 12g3-2(b) exemption from the registration and reporting requirements of the Exchange Act.[211] Presumably, most of these securities trade in the United

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208. Rule 144A(d)(4).

209. *Id.*

210. *See* letter of the Securities Industry Association (SIA) dated September 12, 1989 commenting on the reproposed Rule 144A.

211. *See* Multi-Jurisdictional Disclosure Release, *supra* note 2, at 80,284. According to this release there were also 516 foreign issuers that filed periodic reports (that is were registered) with the Commission under the Exchange Act which includes 150 foreign securities traded on U.S. securities exchanges and 291 quoted in NASDAQ (99 in the National Market

States to some extent, generally in the National Daily Quotation Sheets (the "pink sheets"). Although treated as a reporting company for the limited purpose under Rule 144A of determining the information that has to be furnished upon request to purchasers, the securities of such companies are subject to restrictions on trading in the Rule 144A market not applicable to reporting companies or non-reporting U.S. issuers. If securities of a non-reporting foreign issuer are traded on a foreign exchange or in a designated organized foreign securities market and have been quoted in a U.S. inter-dealer quotation system (which would include the "pink sheets") during the previous twelve months, certain additional conditions designed to prevent flowback to the United States must be complied with in connection with a Rule 144A sale involving securities of the same class. Specifically, the seller or any person acting on its behalf must take reasonable steps to assure that the securities are resold in the United States only if the securities are registered or exempt from registration. Such steps are conclusively deemed to be reasonable if they include an undertaking from the buyer to resell them only if the securities are exempt or registered and a procedure is established that is reasonably designed to prevent the securities from being transferred to other than qualified institutional buyers unless registered or exempt from registration.[212] Such a procedure would ordinarily require the cooperation of the issuer, although trading the restricted securities exclusively in the PORTAL market discussed below is an alternative, assuming that PORTAL becomes operational.

[e] Resales of Rule 144A Securities

The qualified institutional investor purchasing shares sold to it in reliance on Rule 144A has acquired restricted securities[213] and may rely on Rule 144 or Rule 144A for the resale of the securities. Rule 144, which requires a two year holding period, will be a more practicable alternative (except as to securities of certain foreign issuers) if Rule 144 is amended as proposed concurrently with the proposal of Rule 144A so as to permit the tacking of holding periods by successive purchasers of restricted securities.[214] The proposed amendment, however, specifically excludes securities of a foreign issuer which is not a reporting company at the time of the resale. As to securities of such issuer, a new holding period would commence with each Rule 144A purchase. This may mean as a practical matter that once such securities enter the Rule 144A market they cannot enter the U.S. public market if the issuer does not become a reporting

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System). *Id.* However, a list of foreign issuers relying on Rule 12g3-2(b) published by the SEC, according to the author's count, included only 948 companies. *See* Securities Exchange Act Release No. 27325 (Sept. 29, 1989), 44 SEC Docket 1193 (Oct. 18, 1989).

212. Rule 144A(d)(5).

213. Rule 144A, Preliminary Note 5.

214. Proposed amendment to Rule 144(d)(1). *See* Reproposed Rule 144A Release, *supra* note 2.

company. The commencement of a new holding period each time the securities trade will make it difficult for any Rule 144A purchaser to satisfy the Rule 144 holding period requirements. The holder, however, could exit the private market by selling the securities in reliance on Rule 906 in the offshore market in which the security trades, if there is one.[215]

The special regimen for non-reporting foreign issuers suggests that the staff believes that the information available relating to such issuers is less informative than information available relating to non-reporting U.S. issuers. Rule 15c2-11 requires that before dealers can submit quotations in the "pink sheets" relating to a non-reporting issuer that has not made a recent registered or Regulation A offering the market maker must have in its files certain basic information pertaining to the company and make it reasonably available upon the request of a prospective purchaser. There is no requirement that such companies file any information with the Commission. A non-reporting foreign issuer whose securities are traded in the "pink sheets" in most instances is relying on the Section 12g3-2(b) exemption and will have filed and continue to file its home country reports with the Commission. In addition, a market-maker submitting quotations to the "pink sheets" must have in its files the information filed by such foreign issuer with the Commission and make it reasonably available upon the request of a prospective purchaser.[216] Both disclosure systems are seriously flawed, and it is illusory to believe that one is better than the other.

If Regulation S continues to be treated as involving shares issued in transactions not involving a public offering, presumably the holding period of the initial purchaser for purposes of Rule 144 will run from the date of acquisition by the initial purchaser from the issuer. If the securities are resold in reliance on Rule 144A or in successive Rule 144A transactions, the holding period will also run from that date if Rule 144(d)(1) is amended except as to securities of foreign issuers which are non-reporting companies at the time of the sale. Presumably, to the extent purchasers in a Regulation S distribution can resell the securities after the expiration of the restrictions imposed by Regulation S,[217] the purchaser in a Rule 144A transaction should be able to do so as well. In that event, reliance would be placed on Section 4(1) in connection with the resale rather than the Rule 144A safe harbor. The parties to such a transaction will have an interesting dilemma since the seller in order to have the benefit of Rule 144A must notify the buyer that the seller may rely on Rule 144A. In that event, the buyer may be reluctant to purchase the securities if it assumes that the Section 4(1) exemption is available. If it is in fact a Rule 144A transaction, the buyer must conform with the Rule 144 two year holding requirements.

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215. *See* §7[b] *supra.*
216. Rule 15c2-11(a)(4).
217. *See* discussion at §7[c] *supra.*

[f] Rule 144A and Regulation S in Tandem

Rule 144A, if adopted, although broader in application, will work in tandem with Regulation S and to a limited extent will expedite the purchase of foreign securities by U.S. institutional investors. This may occur in several ways. Foreign issuers may place their securities directly with U.S. institutional investors as a private tranche of a public offering being made outside the United States in reliance on Regulation S. A dealer participating in the offshore distribution may purchase part of the issue for distribution to Rule 144A purchasers. Rule 144A is generally not an exemption for the private placement itself, since it excludes issuers and dealers from the provisions of Rule 144A which provides that one selling in reliance on Rule 144A shall not be deemed an underwriter for the purposes of Section 4(1). However, Rule 144A provides that a dealer selling securities in conformity with Rule 144A is not deemed a participant in a distribution within the meaning of Section 4(3)(C) and is not deemed to have offered the securities to the public within the meaning of Section 4(3)(A) which should provide a Section 4(3) exemption for its transactions as a dealer. The nature of the offering should assure that the dealer is not an underwriter for purposes of Section 4(1). This does not, however, assure the issuer of an exemption and presumably it would have to rely on a conventional Section 4(2) exemption under these circumstances, which it may be reluctant to do notwithstanding Preliminary Note 6 which provides that the fact that purchasers of securities from the issuer may purchase with a view to reselling the securities under Rule 144A does not affect the availability to the issuer of the Section 4(2) exemption. The issuer, nonetheless, has made a private placement to the ultimate purchasers which conceptually would not be available if they did not have access to appropriate information relating to the issuer. Further, assuming a violation by the issuer, the dealer, conceivably, may be a secondary violator of Section 5 notwithstanding the dealer exemption.[218]

The dealer alternatively could act as a placement agent for the issuer making the offshore distribution and sell the private tranche to a larger prospective group of institutional and other accredited investors under Regulation D. The Regulation D offering in the United States will not be deemed integrated with the public offering offshore.[219] It is not clear, however, that foreign issuers will be as willing to utilize Regulation D as they have not rushed to do so in the past. There appears to be a misconception as to the complexity of the documentation required under Regulation D vis a vis Rule 144A. In fact, no disclosure document is required under Regulation D if all the purchasers are accredited investors which can be assured if the offering is made only to institutional investors.[220] It

218. *Cf.* United States v. Wolfson, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969).

219. *See* Rule 502(a) NOTE.

220. Rule 502(b)(1).

will, however, be necessary for the issuer to file a Form D and to adopt appropriate restrictions on resales. The availability of Rule 144A for resales and the potential for a liquid secondary market in privately placed securities that Rule 144A promises should minimize this problem. This could very well prove to be the principal impact of Rule 144A in encouraging offshore issuers to offer securities privately in the United States.

On the assumption that most of the foreign issuers that will be inclined to tap the U.S. private placement market will desire to avoid registration and reporting under the Exchange Act, the provisions of Rule 144A and Rule 144(d)(1), discussed above, applicable to non-reporting foreign issuers may serve as a deterrent to the placement of equity securities if securities of the same class are traded or are likely to be traded in the "pink sheets." The additional restrictions are particularly obnoxious because they are applicable not only to the initial Rule 144A transaction, but to subsequent Rule 144A resales as well. This is likely to result in Rule 144A purchasers demanding a severe discount because the securities have less ability to exit from the private placement market than securities of U.S. issuers.

Rule 144A should facilitate distributions made by foreign issuers in reliance on the category 3 safe harbor of Regulation S for equity securities of non-reporting foreign issuers with SUSMI. Domestic U.S. institutional investors which do not have a foreign affiliate could not purchase in the primary distributions. The foreign purchasers, however, will be subject to a twelve month restriction on sales to U.S. persons or in the United States in the absence of an exemption. During the period of such restrictions, the securities can be sold under Rule 906 to U.S. persons if the conditions of Rule 144A are complied with, including transactions in the United States with qualified U.S. institutional investors. The certification provisions of the category 3 Regulation S safe harbor specifically contemplate such resales.[221] The institutional purchaser, however, presumably would be acquiring restricted stock for purposes of Rule 144. If the foreign issuer does not become a reporting company, under the proposed amendment to Rule 144(d)(1) such purchaser would not only have a two year holding period from the date of acquisition but any subsequent qualified institutional purchaser from the foreign issuer would have a two year holding period commencing with the date of its acquisition. The probabilities under such circumstances are that the purchaser would be looking to a resale of the security on a foreign stock exchange or in a DOFSM.

[g] The PORTAL Market For Rule 144A Sales

The NASD has proposed a closed market which would deal exclusively in securities traded in reliance on the Rule 144A exemption.[222] The

221. Rule 905(c)(3).

222. *See* Securities Act Release No. 27470, 54 Fed. Reg. 49164 (Nov. 29, 1989) [herein-

computerized screen based market, to be known as the PORTAL market, will be available for both primary offerings and secondary trading. Since Rule 144A is not available as an exemption for issuers, and since only qualified institutional buyers and dealers are participants in the contemplated system, this apparently assumes that Rule 144A will be available for dealers purchasing a tranche of a private offering or an offering distributed pursuant to Regulation S.[223] The NASD has proposed establishing a number of safeguards to assure that securities traded within PORTAL involve transactions exempt under Rule 144A except as to the informational requirements of the Rule which would be the responsibility of the seller. The proposal also assumes responsibility for policing the exit of securities from the system.[224] This should be no great burden if Rule 144 is available for the resale of the security in the public trading markets as dealers have well established procedures for handling such transactions and for delivering a clean certificate. Nor will it be a problem if a registration statement is filed covering the exiting securities. It could be a significant burden, however, if the resale into the U.S. issues after the end of the Regulation S restriction period discussed at §7[c] are not clarified. The fact that such ambiguities are likely to create inefficiencies for the PORTAL market should provide an incentive for the staff to remove the uncertainties.

§9 CONVERTIBLE SECURITIES

There is no definition in Regulation S of a debt security, raising the issue of whether convertible debt securities are debt or equity and reviving old conceptual differences as to whether such securities are one security or two securities.[225] As discussed below,[226] convertible securities are

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after the "PORTAL Release"]. *See also* discussion at *supra* note 9.

223. *See* discussion, *supra* note 218.

224. *See* PORTAL Release, *supra* note 222.

225. Prior to the adoption of Rule 144, similar conceptual problems existed with respect to privately placed convertible debentures. If the Section 4(2) exemption was available for the private placement of the debentures, arguably the Section 3(a)(9) exemption of the Securities Act for an exchange offering by an issuer with its own security holders exempted the conversion. The Commission, however, took the position that Section 3(a)(9) exempted the conversion, but not the resale of the underlying security which had to find its own exemption. Crowell-Collier Publishing Co., Securities Act Release No. 3825, [57-61 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶76,539 (Aug. 12, 1957). Rule 155 codified this position. Securities Act Release No. 4248, [1957-61 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶76,710 (July 14, 1960). Rule 144(d)(4)(B), however, superseded Rule 155 and takes essentially a one-security approach providing for a single holding period which commences with the acquisition of the convertible debenture. Rule 144 should be applicable with respect to resale of securities distributed offshore to the extent reliance is placed on the Rule so after a two year holding period either the convertible debenture or the underlying common stock could be resold in compliance with the conditions of the Rule. It does not resolve, however, the issue of whether the Regulation S safe harbor is available and when the underlying securities can be resold in reliance on Section 4(1) prior to the expiration of the Rule 144 holding period.

226. *See infra* note 236.

probably equity securities for most purposes,[227] and such securities may be debt for the purpose of determining the aggregate debt securities held by U.S. persons in connection with the determination of whether there is SUSMI for the purpose of a debt offering.[228] It does not, however, necessarily follow that a separate determination would have to be made as to whether there was a SUSMI with respect to the convertible debt security and the underlying equity security. If a convertible debenture is deemed a single security, the distinction is not an important one with respect to reporting companies since, whether debt or equity, it will be in category 2 and subject to the same offering and transaction restrictions. In the case of a non-reporting U.S. issuer, whether debt or equity, it will be a category 3 security. However, as to such issuers, the period and nature of the transaction restrictions depends upon whether the security is a debt or equity security. In the case of a non-reporting foreign issuer with SUSMI, if a convertible debt security is debt it is in category 2; if equity, it is in category 3 and subject to the more rigorous transaction restrictions of that category.

If the convertible debt security is both a debt security and equity security, there will be important different consequences in all of the situations described. In that event, there would be transaction restrictions not only with respect to the convertible security, but also as to the underlying security. In the case, for example, of a convertible debenture issued by a non-reporting foreign issuer, it would be necessary to first determine whether there is SUSMI with respect to both debt and common stock. Assuming there was SUSMI with respect to both, the convertible debenture would be in category 2 and the underlying common stock would be in category 3. If there was SUSMI as to the common stock, but not as to the convertible debt, the convertible security would be in category 1 and the underlying common stock would be in category 3.

The staff's position historically in applying Release 4708 has been similar to Rule 155[229] in regarding a convertible security as two securities and limiting the Section 3(a)(9) exemption to the conversion and not to the resale of the underlying security which must be registered or find its own exemption prior to resale. International Telephone and Telegraph (ITT) in September of 1972 sold $50 million of convertible debentures in the Eurobond market in reliance on Release 4708 adopting a ninety day lock-up as to the debentures. The conversion price was at a premium of approximately forty percent above the current market price of the common stock at the time of distribution.[230] The underlying common stock

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227. Section 3(a)(11) of the Exchange Act and Rule 3a11-1 adopted and Rule 405 adopted under the Securities Act all provide that securities convertible into equity securities are equity securities, but these definitions are not specifically incorporated into Regulation S.

228. *See* §6[c].

229. *See supra* note 225.

230. *See* Int. Tel. & Tel. Corp., SEC No-Action Letter, [1973 Transfer Binder] Fed.

was listed on the New York Stock Exchange and the issuer was, therefore, a reporting issuer. Counsel for ITT requested a no-action letter asserting that Section 3(a)(9) would exempt the conversion and the resale of the underlying shares. The staff replied that based on counsel's opinion it would recommend no action if the convertible debentures were converted into common stock without registration in reliance on Section 3(a)(9). The letter, however, went on and stated: "[W]e cannot agree that the exemption provided in said Section 3(a)(9) would cover resales by the holders of the common stock received upon such conversion. Any such resales would require registration under the Act absent some other available exemption." Counsel then came back with the argument that resales would be exempt under Section 4(1) as transactions not involving an issuer or underwriter. The staff responded that notwithstanding "the facts and arguments presented, we are unable to conclude that this Division would not recommend appropriate action to the Commission if the subject debentures or the underlying stock were to be distributed in the United States without registration under the Securities Act of 1933." The ITT letter, nonetheless, represented a concession from the position previously asserted that the underlying securities had to be registered prior to conversion.[231]

A $60 million offering by Sperry Rand (Sperry) of convertible debentures in the Eurobond market in February of 1973 posed substantially identical issues.[232] The debentures could not be converted until March of 1974. Counsel to Sperry expressed the opinion that the conversion would be exempt under Section 3(a)(9) and the shares could be resold in reliance on the Section 4(1) exemption. The staff gave essentially the same response; no action would be recommended with respect to the conversion, but no views were being expressed as to when the debentures or the shares underlying the debentures could be resold in the United States. In a number of subsequent convertible debenture offerings made in reliance on Release 4708, the debentures were subject to tight lock-up procedures and provision was made for the registration of the common stock prior to conversion apparently to provide the holders with the ability to resell the underlying shares.[233]

The Proposing Release, however, sends some different signals. A footnote to the Proposing Release states that a convertible security is an equity security unless it cannot be converted into the underlying security until the expiration of the restricted period.[234] The Proposing Release

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Sec. L. Rep. (CCH) ¶79,462 (July 27, 1973).

231. *See* California Business Communications, Inc., SEC No-Action Letter (Aug. 9, 1972), in which the staff stated: "[I]t is our opinion that the underlying shares must be registered sometime prior to their issuance resulting from the conversion of the debenture."

232. Sperry Rand Corp., SEC No-Action Letter (March 1, March 13, 1974).

233. *See, e.g.*, Ni-Cal Finance N.V., SEC No-Action Letter (April 30, 1984); Fairchild Camera and Instrument Corp. Int. Finance, N.V., SEC No-Action Letter (Nov. 15, 1976).

234. Proposing Release, *supra* note 2, at 89,139 n.122.

also states that conversion would ordinarily "be exempt from registration under §3(a)(9)."[235] Further, the Proposing Release specifically states that the restricted period would be restricted only for the remainder of the applicable restricted period that applied to the convertible securities.[236] This sounds like a single security theory and an adaptation of the Rule 144 treatment of convertible securities. One confusing aspect of this regulation by release rather than rule is that the no-action letter cited for the proposition that the convertible debenture is an equity security[237] is one of a series of letters taking the position that Section 3(a)(9) does not exempt the resale of the underlying security.[238]

This approach has the virtue of simplifying the application of Regulation S to convertible debentures, making for a nice tidy package. SUSMI for foreign issuers of a convertible debenture would probably be determined on the basis of whether it existed with respect to the underlying common stock. If SUSMI exists and the issuer is a non-reporting company, the convertible debenture as an equity security would be in category 3 and the twelve month restricted period and related restrictions applicable to category 3 equity restricted securities would come into play.[239] The restricted period applicable to the underlying security, however, would commence with the completion of the distribution of the convertible security.

If the security could not be converted until the end of the transaction restriction period, it would be a debt security. SUSMI of a foreign issuer would be determined on this basis. If there was no SUSMI for its debt securities, it would be in category 1; otherwise it would be in category 2. The appropriate Regulation S restricted period which determines the period for which the securities must not be convertible in order to be debt, is "the restricted period, if any, applicable to the equity securities of the issuer."[240] There are no transaction restrictions for category 1 securities of certain foreign issuers provided there is no SUSMI. But whether there is SUSMI may depend upon whether the convertible securities are debt or equity. The reasoning, therefore, becomes circular. One way to break that circle is to determine whether there is SUSMI for the equity securities of the issuer and if there is not to assume that it is a debt security. In that event, applying the foregoing criterion literally, the securities can be immediately convertible since there are no restrictions applicable to its equity securities. If there is SUSMI as to the equity securities of a foreign issuer, the restricted period is forty days as to a reporting company and twelve months as to a non-reporting company. In order to be classified as debt, therefore, the securities of a reporting company could not be con-

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235. Proposing Release, *supra* note 2, at 89,137 n.113.
236. Proposing Release, *supra* note 2, at 89,137.
237. Sperry Rand Corp., SEC No-Action Letter (March 1, 1974). *See supra* note 232.
238. *See supra* note 230.
239. *See* §6[f].
240. *See* Proposing Release, *supra* note 2, at 89,139 n.122

verted for forty days and those of a non-reporting company for twelve months. The same analysis (i.e., non convertible for forty days if a reporting company and twelve months if a non-reporting company) would be applicable to convertible securities issued by a U.S. company.

The foregoing suppositions based on the Proposing Release are all premised on the assumption that the Section 3(a)(9) exemption is otherwise available. In order for the Section 3(a)(9) exemption to be available, no commissions or other remuneration can be paid for soliciting the exchange. If the exemption is not available, the Proposing Release provides that the conversion will be treated as if it involved the exercise of a warrant.[241] Further, this analysis, if correct, although extremely helpful in determining the transaction restrictions that have to be imposed and providing a blue-print for construction of the conversion terms of the convertible debenture, does not necessarily resolve the issue of whether the securities acquired on conversion can be resold in reliance on Section 4(1) or for that matter, whether the convertible securities can be sold in reliance on Section 4(1). The problem with respect to resales in the United States of the convertible debentures is the same as that discussed above.[242] The problem is somewhat different with respect to the underlying securities, which, for example, assuming that they are not converted until after the expiration of the restricted period, the seller may attempt to resell on a U.S. stock exchange the day following acquisition from the issuer since there is no separate restricted period for the underlying securities. The niceties of the Section 4(1) arguments this scenario might produce are likely to have a deja vu ring.

§10 WARRANTS

Regulation S does not work well with respect to warrants or convertible securities that would not have the benefit of the Section 3(a)(9) exemption. This is not surprising as a similar dichotomy exists with respect to convertible securities that are registered and warrants that are issued with a debt security, both of which are registered. Once a registered public offering of convertible securities is completed, that is the end of the matter for the conversion is exempt under Section 3(a)(9) and historically Section 4(1) has been available for the resale of the underlying shares. In the case of warrants issued as part of a unit consisting of debt and warrants to purchase common stock, if the warrants are presently exercisable, there is a continuing offering of the underlying securities and a registration statement covering the underlying shares has to be kept in effect for the life of the warrants at least if the warrants are "in the money" (that is, a favorable relationship of the exercise price to the market price raises the likelihood the warrants will be exercised).[243] If the warrants are issued

241. Proposing Release, *supra* note 2, at 89,137, n.114.
242. *See supra* note 230.
243. *See* SFCL, *supra* note 58, §7.24[1].

by a foreign issuer and neither the warrants nor the debt security have a SUSMI, the Regulation S category 1 safe harbor would permit the offering without restrictions on either security. The question is whether this would be true in the event of an overseas domestic offering. To be in category 1 the offering would have to be made in the issuer's home country. In that event, however, there may be a strong likelihood that the underlying securities will be resold immediately in the United States and the underlying security (as distinguished from the unit) may not satisfy the requirement that it be "made in accordance with customary local practices."[244] For securities in any other category there will be a restricted period. The offer of the underlying securities is a continuous one that is not completed until all the warrants are exercised or expire. The restriction on sales to U.S. persons or in the United States would, therefore, remain in effect throughout the exercise period and for the specified restricted period that commences with the completion of the offering. The Proposing Release states: "Generally, the safe harbor of Regulation S would not be available for the issuance of securities on the exercise of warrants to a U.S. person."[245]

The Proposing Release refers to the no-action letter relating to *Sears Overseas Finance N.V.*[246] as reflecting this position. In *Sears*, the company offered offshore units consisting of Notes in the principal amount of $100 million and warrants to purchase other notes with a different maturity date in the principal amount of $200 million. The Notes originally issued were subject to conventional lock-up provisions for ninety days and the definitive notes and warrants were not delivered to purchasers until the expiration of the ninety days and certification of non-U.S. ownership. The warrants included a legend that they could not be sold to or exercised by any national or resident of the United States. On exercise of the warrants, the holder was required to certify that he was not a U.S. national or resident and undertake not to resell the notes received on exercise of the warrants for ninety days to a U.S. national or resident. No lock-up procedures, however, were adopted as to the notes received on exercise of the warrants. The staff's no-action letter included the usual statement that "no view" was expressed as to when the notes could be reoffered or resold in the U.S. or to citizens or residents of the U.S. without registration under the Securities Act. Although not explicit in this regard, the implication of the Proposing Release discussion of warrants[247] is that the securities received on exercise of the warrants would be subject to the relevant transfer restrictions to U.S. persons or in the United States in order for a safe harbor to be available. To this extent, it goes beyond *Sears* as to certain securities since, it would, for example, with respect to warrants to purchase a debt security of a non-reporting U.S.

244. Rule 902(h).
245. Proposing Release, *supra* note 2, at 89,133 n.93.
246. SEC No-Action Letter (June 11, 1982).
247. *See supra* note 245.

issuer require the use of a global certificate in connection with the issuance of the debt securities.[248] Since the restriction remains in effect for forty day after the completion of the offering, which would not be until 40 days after the expiration of the warrants, warrant holders exercising well in advance of the expiration date would go for an extended period of time without a definitive certificate relating to the security acquired on exercise of the warrants. Similarly, in the case of category 3 equity securities, warrant holders exercising the warrants early would be subject to the restrictions for a period in excess of twelve months. Under these circumstances it would appear imperative for the securities to trade on a foreign stock exchange to provide holders on the exercise of the warrants a market in which they could resell the securities under Rule 906.[249]

§11 EXTRATERRITORIAL REACH OF THE FRAUD PROVISIONS

The liberal attitude of the SEC relating to the sale of unregistered securities outside of the U.S. does not mean that the U.S. securities laws have no application to transactions effectuated within the scope of Release 4708 or Regulation S. The potential extraterritorial scope of the fraud provisions of the U.S. securities laws is as broad as the definition of commerce, which includes the use of any means or instrumentality of commerce between a state of the United States and a foreign country.[250] The Second Circuit in particular has gone very far in finding subject matter jurisdiction with respect to the fraud provisions of the securities laws as they apply to sales made to non-nationals of the United States if the jurisdictional means have been used and significant activities relating to the offering have taken place in the United States. Although the Second Circuit conceptually distinguishes between mere preparatory acts which have taken place in the United States (no subject matter jurisdiction) and acts occurring in the United States which directly caused the loss (subject matter jurisdiction), as a practical matter, the preparation of the prospectus (or other disclosure document) of a U.S. issuer has to take place primarily in the United States, in which event it appears that the fraud provisions are applicable.[251] It does not appear (as to private placements) that the failure to make any disclosure will avoid jurisdiction since a culpable failure to act which occurs in the United States can be the basis for subject matter jurisdiction.[252]

Judge Robert Bork, then sitting on the Court of Appeals for the District of Columbia, approached the question of extraterritoriality from a

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248. *See* §6[f].

249. *See supra* §7[a].

250. 15 U.S.C. §77b(7); 15 U.S.C. §78c(a)(17).

251. *Compare* Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975), *with* ITT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980).

252. Bersch v. Drexel Firestone, *supra* note 251, at 993. *See also* Continental Grain (Australia) PTY, Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979).

slightly different perspective.[253] The plaintiffs were citizens of West Germany who bought securities consisting of interests in a West German limited partnership that contemplated investing in U.S. real estate. Arthur Anderson & Co. GmbH (GmbH), a West German limited liability corporation, prepared a report relating to the "entire plan" and the defendant, Arthur Anderson & Co. (AA-USA) furnished information to GmbH to be included in the report. The information was alleged to be false and misleading. AA-USA challenged the subject matter jurisdiction of the U.S. courts.

Judge Bork surveyed the case law in the other circuits, referring to the Second Circuit's position as evidenced by *Bersch* as more restrictive than the views of the Eighth Circuit in *Continental Grain*[254] and the Third Circuit in *Kasser*.[255] It is sufficient, under *Continental* with respect to the sale of securities by foreigners to foreigners that the conduct of the defendant in the United states "was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment."[256] The Third Circuit's test in *Kasser* "where at least some activity designed to further a fraudulent scheme occurs within this country,"[257] is even "more permissive."[258] *Kasser*, however, may be appropriate (although the court noted it was not deciding that issue) since it involved an action by the SEC which "is a responsible governmental agency" and can take into account the policy concerns of the State Department in initiating an action involving foreign contacts.[259] To a degree all of the decisions are policy oriented since the statute is not explicit and there is no relevant legislative history. Judge Bork, if writing on a clean slate, might have been inclined "to doubt that an American court should ever assert jurisdiction over domestic conduct that causes loss to foreign investors."[260] In view of "the Second Circuit's preeminence in the field of securities law," and out of a "desire to avoid a multiplicity of jurisdictional tests," the court opted for adopting the Second Circuit test since it opened up the door to American courts the least.[261] The court then applied its restated version of that test as one that required that the acts of the defendant committed in the United States satisfy all the elements of a Rule 10b-5 claim other than reliance and damages.[262] The court concluded that since the defendant did not furnish information used in any disclosure document, but merely furnished it to another party who in turn used the information, that the

253. Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987).

254. Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979).

255. SEC v. Kasser, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

256. 592 F.2d at 421.

257. 582 F.2d at 114.

258. 824 F.2d at 31.

259. *Id.* at 33 n.3.

260. *Id.* at 32.

261. *Id.*

262. *Id.* at 33.

defendant's acts were not in connection with the purchase or sale of a security.[263] Since one of the elements of Rule 10b-5 was not established as to the defendant, subject matter jurisdiction did not exist.

The court invited a comparison with the leading Rule 10b-5 case on the issue of whether misrepresentations were made in connection with the purchase or sale of a security in which the test is whether "assertions are made . . . in a manner reasonably calculated to influence the investing public, e.g., by means of the financial media . . . ."[264] Judge Bork, however, appears to have disregarded the allegations of the complaint that AA-USA knew that the information it furnished would be included in the report and relied upon by investors by referring to the "private" nature of the communication. Similarly, he glossed over *Texas Gulf Sulphur* by contrasting the private communication with the use of the "means of the financial media," disregarding the fact that the "e.g." in the quote reflected that the financial media was illustrative rather than exhaustive and ignoring the end use of the information. He also reinforced his views by reference to Section 30(b) of the Exchange Act which excludes the application of the Act to conducting a business in securities outside of the United States unless the Commission explicitly adopts rules necessary or appropriate to prevent evasion of the Act. He drew from this the inference that Congress intended to limit the extraterritorial application of the Act. What he fails to note is that this provision deals with the regulation of the securities business outside the United States; that is, activities of broker-dealers. Chief Judge Wald, in concurring, disassociated herself from the rationalization of the opinion, concluding that under any approach the misrepresentations alleged were insignificant and so indirectly related to the fraudulent scheme that federal jurisdiction did not exist.

Where AA-USA issued certified consolidated financial statements for DeLorean Motors Co. and its subsidiaries, the field work for which, it contended, was largely done in the United Kingdom and Ireland, the district court, nonetheless, refused to dismiss for lack of subject matter jurisdiction.[265] The purchaser-plaintiff was an agency of the British government and the securities sold consisted of preferred stock of a UK subsidiary. In addition to concluding that there was at least a dispute as to the amount of work done outside of the United States on the audits, AA-USA also, since it certified the statements, had a duty to supervise the work under generally accepted auditing standards. Further, the close relationship of the American parent and its foreign subsidiary, based on *Cornfeld*, permitted the court to regard the securities as being "in substance" American securities rather than foreign securities.[266]

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263. *Id.* at 34.

264. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968). *See* SFCL, *supra* note 58, §9.10[1].

265. Dept. of Economic Dev. v. Arthur Andersen & Co., 683 F. Supp. 1463 (S.D.N.Y. 1988).

266. *Id.* at 1471.

§12 CONCLUSION

The adoption of Regulation S and Rule 144A will stimulate offshore distributions, will provide a less regulated access to the U.S. market to foreign issuers, will enhance the liquidity of securities issued in the private placement market, and will enhance the access of U.S. institutional investors to issues of securities by foreign companies. The impact, however, is likely to be a modest one in all of those areas notwithstanding the predictions for dramatic change.

U.S. and other issuers have been distributing huge amounts of securities in the Eurobond market for well over a decade, with the U.S. issuers using lock-up procedures to prevent flowback and many foreign issuers oblivious to the theoretical subject matter jurisdiction of the SEC. Regulation S will make the restrictions somewhat less cumbersome, should improve the efficiency of this market and, hence, make it at least marginally more attractive than presently. Unfortunately, Regulation S does not say point blank that once the safe harbor restricted period has expired the securities can be resold to U.S. persons and in the United States. The ambiguities in this area will continue to be of concern although they are greatly alleviated by the fact that the securities can be resold at any time if the securities are traded in an appropriate foreign securities market.

The extent to which foreign issuers will be more likely to offer securities in the United States is more a matter of perception than rule-making. Rule 144A does not provide an exemption for issuers making a private placement although it will facilitate purchases of a block of securities from an issuer by a dealer which can rely on Rule 144A in connection with the resales. Nor does Rule 144A provide greater flexibility as to the disclosure document that can be used in a private placement than Regulation D. Regulation D does not require the use of any disclosure document in sales to accredited investors.[267] A foreign issuer can use its foreign prospectus, assuming it complies with the fraud provisions, or it can use no disclosure document in an offering of a private tranche made in reliance on Regulation D. If the assumption is that the dealer will buy a block from the foreign issuer and distribute it in the United States under Rule 144A, the issuer must still be concerned about its exemption.[268] Reliance on Regulation D rather than Section 4(2) appears to be advisable and would permit a much broader market for the primary distribution since the offering could be made to any accredited investor.[269] In that event, Rule 144A would add liquidity by providing a secondary market

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267. Rule 502(b)(1).

268. *See* discussion at *supra* note 218.

269. The PORTAL market, however, would not be available for the primary distribution if made to accredited investors who are not qualified institutional purchasers under Rule 144A. Purchasers that are Rule 144A qualified could go directly into PORTAL to resell the securities and non-qualified purchasers could access PORTAL for resales through a broker with access to PORTAL. *See* discussion, *supra* note 9.

which would not be inconsistent with the resale restrictions of Rule 502(d). It would be necessary for the issuer to file a Form D, which is the simplest of procedures.[270] There may be an assumption that if the securities are purchased by the dealer and resold in reliance on Rule 144A that only the dealer will have Section 12(2) liability for misrepresentations in the selling materials.[271] This issue has not been fully resolved and appears to be a risky assumption from the standpoint of the issuer.

Regulation S will facilitate purchases of securities distributed offshore, including foreign securities, by U.S. institutional investors who organize a separate subsidiary based offshore since such subsidiaries will not be U.S. persons. Those that do not have a subsidiary will be able to purchase securities distributed offshore by foreign issuers relying on the category 1 safe harbor, but only if the transaction (including the offer) takes place offshore. This will be no easy matter for an institutional investor that has neither an offshore subsidiary nor an offshore presence. It is further complicated by the fact that there can be no directed selling effort in the United States; hence, there is a problem as to how such institutional investors will become aware of the offering. Qualified U.S. institutional investors can effect Rule 144A transactions with the original purchasers in a Regulation S distribution. The primary way most U.S. institutional investors will participate is by purchasing the securities distributed offshore in the organized offshore securities market in which they are traded and by purchasing securities of foreign issuers that are placed privately in the United States.

A principal impact of Regulation S and Rule 144A will be to significantly enhance the liquidity of the secondary market in securities privately placed in the United States. This will be particularly true once the PORTAL market is in place. Institutional investors will be encouraged to purchase securities privately placed in the United States by foreign issuers because they are likely to have an outlet before the expiration of the Rule 144 two year holding period through PORTAL or a foreign trading market. Purchasers of privately placed domestic securities will have the same outlets, but it is less likely that there will be a foreign market for the security.

There has been a tendency to overlook the significance of the General Statement to the effect that offshore offers and sales of securities are not subject to the registration provisions of Section 5.[272] Although one obviously prefers to rely on a safe harbor, the General Statement may be useful in situations in which the safe harbor is unduly restrictive. This might be the case, for example, with respect to the resale of shares underlying

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270. *See* SFCL, *supra* note 58, §4.05[7].

271. *See* Collins v. Signetics Corp., 605 F.2d 110 (3rd Cir. 1979). *See also* Pinter v. Dahl, 486 U.S. 622, (1988). *But see* Abell v. Potomac Ins. Co., 858 F.2d 1104, 1115 (5th Cir. 1988) ("everyone who invested in the initial offering bought from the underwriters and the issuer"). *Cf.* SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980).

272. *See* § 5.

warrants in which the restricted period is measured from the expiration of the exercise period rather than when the warrant is exercised because the offering of the underlying shares is a continuous offering. The existence of the General Statement also affords the basis for attempting to obtain a no-action letter in situations in which Regulation S did not get everything right in the first instance. It may also be of some comfort with respect to resales in the United States after the end of the restricted period as to which Regulation S is silent.

A frustrating aspect of both proposed Regulation S and Rule 144A is the tendency to regulate by the legislative history reflected in the proposing and reproposing releases rather than in the regulation. A consequence is that one must scour the releases (and particularly the footnotes) for important nuances not covered by the proposed rules. One purpose of this article has been to perform that function for the reader, but someone with a specific problem will have to repeat that process to be sure that nothing has been overlooked.

The possible combination of transactions that will arise as the result of the interrelationship of Regulation S and Rule 144A is almost limitless, as are the various scenarios relating to offshore distributions that will be subject to Regulation S. Part II of this article will approach Regulation S and Rule 144A from the vantage point of specific offerings and transactions rather than in general abstract terms.

BOOK REVIEW

International Law and the Use of Force by National Liberation Movements

*Reviewed by Dr. Ranee Khooshie Lal Panjabi**

WILSON, HEATHER A., INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS, Clarendon Press, Oxford, England (1988); ISBN 0-10-825570-5, 209 pp.

This very readable and interesting book is a revised version of the author's doctoral thesis submitted to Oxford University in 1985. The research is thorough with a judicious blend of primary and secondary sources. The subject is explored from a variety of perspectives with emphasis on the changing perceptions concerning the legitimacy of force as an instrument in securing self-determination. The role of the United Nations forms a vital part of the thesis and there is detailed discussion of the 1977 Protocols Additional to the 1949 Geneva Conventions. This book would be useful for university students in international law, international relations, history and political science.

Wilson makes the reader aware of the progressive development of international law and international practice in the subject of national liberation movements. The rapid decolonization process which occurred after the Second World War brought a new set of 'actors' onto the 'international stage.' Newly-independent countries eager to play a significant role in international politics could, by force of numbers at the United Nations General Assembly, influence the passage of resolutions granting approval to wars of national liberation. Overriding the Western approach which preferred to think of war in its traditional sense as an inter-State exercise, the new nations of Asia and Africa pushed for the recognition of national liberation movements in those areas still ruled by colonial powers. They dismissed the colonial argument that such movements were internal rebellions and purely domestic problems, insisted on internationalizing anti-imperialist conflicts and even granted premature recognition to some revolutionary groups in order to enhance the latter's status and global prestige.

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While the Charter of the United Nations does not condone the use of force to acquire political sovereignity, in practice, the United Nations has affirmed its recognition of the legitimacy of populations struggling to be free of colonial and alien domination. Such people have, according to the General Assembly, the right to self-determination and independence and can, presumably, utilize all necessary means at their disposal in the attempt to exercise that right. This would, in the perception of most Afro-Asian countries, legitimize the various national liberation movements.

The passage in December 1960 of General Assembly Resolution 1514(XV), The Declaration on the Granting of Independence to Colonial Countries and Peoples, proved to be a significant milestone. This encouragement to the principle of self-determination and condemnation of alien domination heralded a new approach in international thought leading to a recognition of an existing reality, in that independent Afro-Asian States were actively pursuing the mission of helping to free their less fortunate neighbors. In that sense, the General Assembly was merely echoing existing thought in a significant area of the world.

The rapid pace of change in political approaches caught Western states somewhat off guard. Traditional ideas of international war as an exercise confined to States possessing the usual criteria for statehood — land, population, sovereignity — have been challenged by the commitment of independent Afro-Asian nations to using the international forum at the United Nations to confer legitimacy, recognition and even prestige on certian liberation movements. Most important of all has been the dismissal of the idea that international war has to be fought only between States. The concept of international war as applying to peoples fighting against an alien ruler has also gained acceptance. While resolutions of the General Assembly may not have binding force on Member States, these declarations are a significant indication of world public opinion. To that extent they play a role in formulating and reflecting changing international perceptions.

The blurred distinctions between internal and international conflicts have been amply explored by Wilson who points out that the reason why national liberation movements seek international status is largely to free themselves from the constraints of municipal law and to acquire belligerent status for their armed personnel, which would give them rights in international law.

For third party States, the developments of the past four and a half decades have been momentous. Traditionally, assistance to insurgent, rebellious movements by outside Governments was deemed to contravene the principles of international law. A number of authors still support this view. However, the practice of States, including Western nations, indicates that occasionally assistance can even be given to indigenous rebellious groups fighting against their own national governments. The United States government's assistance to the Contra movement in Nicaragua is a case in point. The American Government's justification of its actions as being in support of a legitimate liberation movement proves that even

Western States have been influenced by the new perceptions brought to the international scene, largely by Third World nations. While generally denying the validity of these novel ideas in the United Nations, countries like the United States have not hesitated to use the new rhetoric where their own interests are thought to be directly affected.

Hence, one might argue that the legitimacy of liberation movements, their international status and their right to justify the use of force in ousting a colonial or alien or dictatorial government are already accepted as custom in international practice. The extent of third party intervention in such conflicts is now so routine that traditional concepts of international law may well need revision.

Wilson has conducted a detailed study of the humanitarian implications of these new perceptions of the right to use force by national liberation movements. However controversial the idea that rebellious groups have some inherent right to resort to violence to oust their governments, it is now widely recognized that international law must seek to protect the innocent victims on both sides by extending and expanding the perimeters of international conventions currently in force and by applying them rigorously in any conflict. The conferring of prisoner of war status to captured armed personnel is only one possibility. Cooperation by all parties with Red Cross efforts to alleviate the plight of the wounded and of civilian populations in the fighting zones is another. The 1977 Protocols Additional to the 1949 Geneva Conventions have attempted to expand the boundaries of international humanitarian law. The reluctance of governments under fire from liberation movements has delayed the universal acceptance of these obligations. Ironically, as Wilson points out, national liberation movements have generally been more willing to cooperate in enforcing international legal principles and obligations largely because this assists their attempt to gain acceptance as legitimate movements.

In seeking to prove her point by example, the author has referred briefly to a number of revolutionary movements. One can only wish that she had spent more time on some of these examples. A more in-depth study of the Palestinian uprising and a more detailed analysis of the South African situation would have enhanced the book. Hopefully, she will continue her research in this topical field of international law and apply her conclusions to specific national liberation movements in future monographs.

Wilson's conclusions are basically sound: that 'peoples' can possess status and even personality in international law and society; that the current defintion of 'people' is not exclusively ethnic but more territorial in scope; that national liberation movements have successfully challenged the exclusive right of the state to use force; that wars of national liberation are now largely deemed to be international wars and international law must apply in such cases. The percepts of international law are generally slow to catch up with the realities of international politics. This has been the case in the topic under discussion as indeed in other areas of

international law.

Finally, the period since the Second World War has witnessesd the emergence of a new group of nations whose actions and ideas have brought about rapid change in attitudes and policies, particularly in the United Nations, which replaced the smaller League of Nations. No longer is international law created by the consensus and compromise of a handful of powerful States, mainly in the West. Each day, the traditional norms are being chipped away by the challenges posed by the new players in the game. While their participation makes the entire process uncertain and full of risks, it also makes the process dramatic, daring and more in line with public opinion as represented by the majority of the world's population. For the West, this implies both promise and peril. Too rigid an adherence to outmoded norms will put the North American-European world out of touch with its global neighbors. Too eager an acceptance of dynamic definitions of self-determination and national freedom can only be made at the sacrifice of traditional long-held ideas. A flexible, pragmatic approach would benefit both the West and the Third World. The next few decades will determine whether we in the Western world are up to the challenges posed by our Afro-Asian neighbors and whether we can adjust our patterns of thought to fit the new realities of international practice.